scanning electron microscope ("SEM"). He explained that the SEM gives an examiner greater depth of field and a better view of any particles transferred to the bullet from a ricochet surface. Haag found many grains of mineral materials embedded in the bullet. Specifically, he found grains of quartz and silicon dioxide, which he identified as sand. He also found grains containing silicon, aluminum, and calcium. Sand is found in concrete, and silicon, aluminum, and calcium are found in stones, asphalt, or concrete. Haag testified that the presence of the particles support the conclusion that the bullet hit and ricocheted off an abrasive surface before striking Guerrero.

Haag also studied the report of the autopsy performed on Armando Guerrero and testified that autopsy findings were consistent with the findings of ricochet damage to the bullet. The autopsy report stated that the bullet entered Guerrero's body pointing up and to the side. The bullet traveled between two ribs, grazed the heart and stopped inside the chest cavity, penetrating only a few inches into Guerrero's body. Haag testified that a bullet entering soft tissue will ordinarily penetrate ten to twelve inches. If the bullet has ricocheted, however, it will "tumble" rather than going [sic] straight, and will not penetrate as deeply as it would with a direct shot. A "tumbling" bullet will also cause an asymmetric abrasion rim on the entrance wound, which was found on Guerrero's body. Haag ran tests on ordnance gelatin and other tissue stimulant to confirm these conclusions.

Haag also calculated the approximate distance between Draughon and Guerrero when Draughon fired the gun. Haag estimated that the bullet struck an object or surface[3] at approximately a five degree angle and ricocheted. Haag based the estimate on the condition of, and markings on, the bullet. When a bullet strikes the ground at a five-degree angle, it ricochets from the ground at an angle of one to two degrees. The autopsy report stated that the bullet struck Guerrero at a point on his body approximately forty-seven inches above the ground. Based on these figures, Haag calculated the distance the bullet traveled before striking the ground or object from which it ricocheted and the distance the bullet traveled after striking the ricochet surface but before hitting Guerrero. Haag estimated that Draughon stood from thirty to one hundred yards from Guerrero when he fired the gun. Haag could not be more precise about the distance from which Guerrero was shot because the evidence conflicted as to whether Draughon was on the ground or on the truck bed when he fired the gun. In addition, Haag had no information as to whether Guerrero was standing straight up or stooping when he was shot. As a result, Haag could only provide estimates of the impact and departure angles of the

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[3] Based on his review of the crime scene, Haag concluded that the ricochet surface was most likely the ground, but he did not definitely rule out the possibility that the bullet ricocheted off another surface, such as a wall.

bullet.[4]

Draughon, 427 F.3d at 291-92.

III. State and Federal Court Proceedings

Draughon was indicted, convicted, and sentenced to death in Harris County, Texas for murdering Armando Guerrero during a robbery. The Texas Court of Criminal Appeals affirmed Draughon's conviction and sentence in May 13, 1992. *Draughon v. State*, 831 S.W.2d 331 (Tex. Crim. App. 1992). Draughon's petition for writ of certiorari was denied by this Court on June 28, 1993. *Draughon v. Texas*, 509 U.S. 926.

Draughon filed his state application for writ of habeas corpus on September 2, 1991, while his direct appeal was still pending. The trial court entered findings of fact and conclusions of law, which were later adopted by the Court of Criminal Appeals in denying Draughon's application for habeas relief. *Ex parte Draughon*, No. 27,511-02 (Tex. Crim. App. 2001)(unpublished order).

Draughon subsequently filed his federal petition for writ of habeas corpus in the district court on May 6, 2002. An evidentiary hearing was held on February 26, 2004, during which evidence related to Draughon's ineffective assistance of counsel claim was

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[4] Draughon, No. H-02-1679, at 19-22 (internal citations omitted) (emphasis in original). The district court misreads Haag's testimony regarding the distance the bullet traveled before striking the victim. While admitting that certain factors may affect the distance the bullet traveled, Haag gave conservative estimates based on the likely position of Draughon and the victim when the shooting occurred. He testified that the distance from Draughon to the point of ricochet ranged from fifteen to twenty yards, while the distance from the point of ricochet to the victim could range from thirty to thirty-seven yards.

presented. On September 20, 2004, the lower court conditionally granted habeas relief on Draughon's claim that counsel was ineffective for failing to present ballistics evidence during trial. *Draughon v. Dretke*, No. 4:02-cv-1679 (S.D. Tex. 2004).

The Director appealed the district court's decision to the Fifth Circuit Court of Appeals. However, the appellate court affirmed the district court's conditional grant of habeas relief on September 30, 2005. *Draughon v. Dretke*, 427 F.3d. 286 (5th Cir. 2005). The instant petition followed.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision affirming the district court's grant of federal habeas relief is in discord with federal constitutional law as set out by this Court and other federal courts of appeals. Established precedent clearly prohibits hindsight analysis of ineffective assistance of counsel claims on appellate review. Nonetheless, the court of appeals' determination that counsel was ineffective for failing to discover and present certain ballistics evidence during trial is supported by such retrospective analysis. Because the Fifth Circuit's opinion in this case undermines the Sixth Amendment authority set out by this Court, certiorari is warranted in this case.

I. The Court of Appeals' Decision Undermines the Authority of This Court Regarding the Application *Strickland's* Ineffective Assistance of Counsel Standard.

The Fifth Circuit reviewed Draughon's ineffective assistance of counsel claim with the distorting effect of hindsight. In so doing, the lower court ignored Sixth Amendment jurisprudence of this Court, dictating that counsel's conduct must be viewed in light of the circumstances present at the time of the

challenged conduct. The decision in this case placed the Fifth Circuit at odds with well established federal constitutional law. As a result, certiorari review should be granted to resolve this important conflict.

A. This Court demands that judicial scrutiny of counsel's conduct must be deferential and avoid hindsight analysis.

Under *Strickland's* two prong test, a petitioner does not prove a violation of his Sixth Amendment right to counsel unless he demonstrates that (1) counsel's performance was deficient and (2) this deficiency prejudiced his defense. 466 U.S. at 687-88, 690. Counsel is deficient only where his/her "representation fell below an objective standard of reasonableness." *Id.* at 687-88. The prejudice prong requires that a petitioner show a reasonable probability that, but for counsel's error, the results of the proceeding would have been different. *Id.* at 694. No constitutional violation exists unless both prongs are proven. *Id.* at 697.

Importantly, this Court has admonished that judicial scrutiny of counsel's performance must be highly deferential, "with every effort made to avoid the 'distorting effect of hindsight.'" *Id.* at 698-90. Thus, "a fair assessment of attorney performance requires that every effort be made to...reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*; *see also Wiggins v. Smith*, 539 U.S. 510, 523 (2003)("In assessing counsel's investigation, we must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time.")(internal citations and quotations omitted).

Because of the inherent difficulty in this type of evaluation, this Court has held that there is a strong presumption the alleged deficiency "falls within the wide range of reasonable professional assistance." *Id.* The defendant must, therefore, "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, at 689 (internal quotations omitted). Furthermore, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."

Accordingly, the appropriate inquiry here is necessarily whether counsel's decision not to seek an independent examination of the fatal bullet was reasonable under the circumstances *present at trial*, and not simply in light of the evidence discovered recently during the federal evidentiary hearing.

B. When viewed in light of this standard, counsel's conduct in this case does not offend the Constitution.

Counsel's decision to forgo the assistance of a ballistics expert during trial was a sound, tactical decision made in light of the circumstances present at the time. It is clear from the record that counsel prepared Draughon's defense based upon Draughon's insistence that, when shooting towards the crowd, he was aiming high over their heads and not directly at them. Draughon attempted to convince the jury that because he was aiming high over the heads of the crowd, he did not intend to kill anyone, and thus could not be guilty of capital murder.[5] Counsel stated in his affidavit that in

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[5] Pursuant to the Texas Penal Code a person commits capital murder if he intentionally of knowingly causes the death of an individual in the course of committing or attempting to commit robbery. TEX. PENAL CODE §§ 19.02(b)(1), 19.03(a)(2). The Penal Code defines the culpable mental states of

looking to support this theory at trial,

> I traveled to the scene of the offense and obtained photographs and measurements. I studied the exterior of the building for evidence of bullet strikes. In addition...I made a thorough review of the prosecutor's file and State [sic] evidence against Draughon.

Appendix B at 27. The obvious difficulty with proving this theory is that despite Draughon's contention that he was aiming high, a bullet struck the victim squarely in the chest, about four feet off the ground.[6] At trial, counsel relied heavily upon the fact that a possible bullet strike was discovered on the outside wall of the building behind the victim approximately nine and a half feet from the ground, thus giving credence to Draughon's assertion that he was "aiming high."

"intentionally" and "knowingly" as follows:

(a) A person acts intentionally, or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

TEX. PENAL CODE § 6.03(a), (b).

[6] Indeed, when asked to explain this fact during his testimony at the punishment phase of his trial, Draughon could not, answering simply, "I don't know." 10 RR 32-33.

Draughon now claims that counsel should have inspected the fatal bullet to determine whether there was evidence that the bullet might have ricocheted before striking the victim. However, counsel's decision not to examine the bullet and submit it for forensic evaluation is reasonable under the circumstances in this case because, given Draughon's rendition of the events that night, ricochet was implausible. Even if there were evidence of ricochet, it would undoubtedly have injured Draughon's defense more that it would have helped.

In order to assist the defense, ricochet damage to the bullet would need to suggest to the jury that Draughon was, in fact, intending to aim high over the heads of the crowd pursuing him, and not directly at them. A careful inspection of the crime scene reveals that if, indeed, Draughon aimed his weapon over the heads of the crowd, there was no surface the bullet could have struck before reaching the victim - except the ground. Testimony establishing that the bullet ricocheted off the ground might very likely suggest to the jury that Draughon was aiming lower than he contended. As such, evidence of ricochet could have harmed Draughon's defense.[7]

Counsel's decision not to pursue a strategy that could have been harmful to the defense was reasonable under the Sixth Amendment.

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[7] For these same reasons, there is no reasonable probability that counsel's alleged deficiency could have affected the outcome of the verdict, thus resulting in prejudice.

C. The Fifth Circuit's application of hindsight analysis undermines this Court's Sixth Amendment Jurisprudence.

In his appeal below, the Director urged that the district court erred in failing to examine counsel's conduct in the context of the circumstances present at trial. The Fifth Circuit noted that,

> [t]he State is on solid ground in pointing to risks inherent in the retrospective examination of what should have been done aided by knowledge of how it all played out. This risk, coupled with the deference to the adjudication by the State courts required by Congress and general principles of comity and federalism, demands that federal courts be sensitive to unwittingly harsh judgments of choices made by lawyers in the heat of trial--choices that were not so clear at the time as they often become with hindsight.

Draughon, 427 F.3d at 297. Nevertheless, the Court engaged in the very hindsight analysis it cautioned against.

In finding that the district court properly granted federal habeas relief on Draughon's ineffective assistance of counsel claim, the court relied upon the potentially beneficial impact Dr. Haag's testimony might have had on the jury if presented at trial. Even assuming that Haag's testimony would have been helpful to the defense, this fact, alone, is not sufficient to demonstrate that counsel was deficient in deciding not to pursue a ballistics expert. This is the very type of analysis that *Strickland* and its progeny speak so loudly against. Allowing this decision to stand would undermine the Sixth Amendment jurisprudence of this Court.

II. The Lower Court Failed to Afford the Deference Required Under Federal Statute.

As an initial matter, this proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254 (West 2004).

This Court has explained that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite result. *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Alternatively, a state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

A federal habeas court's inquiry into unreasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *(Terry) Williams*, 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "[w]hether or not [this Court] would reach the same conclusion." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002); *(Terry) Williams*, 529 U.S. at 411. As this Court recently explained:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was

> unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 124 S. Ct. 2140, 2149 (2004).

In this case, the court of appeals failed to offer the proper deference to the state court's determination on the merits of Draughon's ineffective assistance of counsel claim. The state court concluded that:

> [c]ounsel cannot be held ineffective based on possibly differing expert opinions concerning the trajectory of the bullet, especially in light of the overwhelming evidence that [Drag on], armed with a deadly weapon, entered a restaurant with the intent to commit an aggravated robbery and that [Drag on] shot a witness as [he] fled from the scene.

SH. at 588 ¶ 7.

Although, it was clear from the opinion that the lower court disagreed with the state court's adjudication of this claim and found it wrong, it is not from the opinion why the court found the state court's determination *unreasonable*. As previously stated, *Williams* dictates that a federal habeas court may not grant a writ simply because it find, in its independent judgments, that the state court erred in its application of strickland. Rather, that decision must be unreasonable. Here it was not.

There is serious question as to whether the information that Haag provided in the federal district court would have been helpful to Draughon at trial. As argued above, this information could have

been potentially harmful because it directly conflicted with his version of the events that happened during the robbery. The state court's determination that there was no prejudice in this case, is therefore, not unreasonable.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari in order to ensure the uniform application of *Strickland's* well settled Sixth Amendment principles.

Respectfully submitted,
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARTIN ALLEN DRAUGHON,	§	
Petitioner,	§	
	§	
v.	§	No. 02-CV-1679
	§	(Judge Lee H. Rosenthal)
DOUG DRETKE, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND ORDER

Petitioner, Martin A. Draughon, seeks a writ of habeas corpus under 28 U.S.C. § 2254, challenging his state court conviction for capital murder and death sentence. Respondent, Doug Dretke, director of the Texas Department of Criminal Justice-Correctional Institutions Division, has filed a motion for summary judgment. Having carefully considered the petition, the summary judgment motion, the state court record, the parties' submissions, and the applicable law, this court grants in part and denies in part Respondent's motion for summary judgment and grants in part and denies in part Drag on's petition for writ of habeas corpus, entering final judgment by separate order. The reasons for these rulings are set out in detail below.

I. Backgrou..d.

On November 22, 1986, Drag on attempted to rob a Long

John Silver's restaurant in Houston, Texas.[8] Draughon's accomplice, Kenneth Gafford, was a former employee. 1 Tr. At 86-87, 95.[9] Hubbard Eugene Taylor, the assistant manager, closed the restaurant at approximately 11:00p.m. As he finished closing up, Taylor saw two relatives of his cashier gesturing to him through the window. Taylor and two employees went outside. A man wearing a stocking mask pointed a gun at them and said: "This is a stick up. Get back inside." The four complied. The robber told Taylor to "[g]et that alarm in the back. I know it's in the back." Taylor went to open the safe. The safe had a delay mechanism that required Taylor to wait ten minutes after entering the combination for a green light to come, signifying that the safe could be opened. While Taylor waited, the robber approached him and asked, "[where is that green light?" While still waiting for the green light, Taylor heard some noise coming from the front of the restaurant. He later learned that the noise was caused by several people banging on the doors and windows. The robber then went to the back of the restaurant. Taylor heard the alarm go off and saw the robber leaving through the back door. *Id.* at 102-17. Restaurant employee Susan Cuellar later identified Drag on as the robber. 2 Tr. At 225-30.

Ricardo Guerro lived near the restaurant. As he drove up to his apartment shortly before midnight on November 22, 1986, he saw a woman running. The woman was crying and screaming for

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[8] Drag on does not dispute that he attempted to rob the restaurant or that he shot and killed the decedent. As discussed in more detail below the decedent. As discussed in moredetail below, Drag on challenged, on numerous grounds, the finding that he was guilty of capital murder, and raises a number of other issues relevant to both the guilt and sentencing phases of his trial.

[9] "TR." refers to the transcript of Draughon's trial. The number preceding "TR." refers to the volume number, and the numbers following "Tr." refer to the specific pages in the transcript. "1 Tr. At 86-87" refers to volume 1, pages 86-87 of the trial. Transcript.

help. Guerrero followed the woman to the back of the restaurant. Others, attracted by her pleas for help, also followed. Guerrero saw the back door of the restaurant open and a man run through the door. The man ran into the parking lot, then turned around. Guerrero heard a shot, threw himself to the ground, and heard several more shots. He also heard a truck engine. When Guerrero looked up, he saw the man jumping onto the bed of a moving truck. Guerrero testified at trial that the man fired no additional shots after jumping onto the truck. After the truck left, Guerrero stood up ans saw his cousin, Armando Guerrero, lying on the ground. Armando Guerrero had a bullet wound in his chest. Several of the men in the parking lot drove Armando Guerrero to an emergency room, where he died. 2 Tr. At 248-60.

Eva Cuellar, the mother of the restaurant cashier, also witnessed the shooting. She testified that Drag on took about ten running steps after leaving the restaurant, began shooting, then jumped into a truck, which drove away. Cuellar also testified that Drag on fired no shots after he jumped into the truck. 3 Tr. At 475-80.

Norene Smith was a nurse working in the emergency room when Armando Guerrero was brought in. She described the medical staff's unsuccessful efforts to resuscitate him. Smith explained that when the doctors opened Armando Guerrero's chest, they discovered that the bullet had wounded his heart. There was a great deal of blood in the chest cavity. *Id.* at 283-92 Dr. Aurelio Espinola, a forensic pathologist, testified that the gunshot wound caused the death. *Id.* At 294-311.

The jury found Drag on guilty of the capital murder of Armando Guerrero during the course of attempting to commit a robbery. 3 Tr. At 542. At the punishment phase, the State presented evidence that Drag on had robbed another Long John Silver's restaurant two days before the murder and that he had raped an employee of that restaurant during the robbery. The rape victim

identified Drag on as the robber and rapist both in a police lineup and in court. 4Tr. At 94-95. Drag on had also robbed the same Long John Silver's restaurant where Guerro was killed a few nights before the murder. *Id.* At 50-54, 5 Tr. at 277-301. The jury also heard evidence that Drag on had accosted two men with a knife in July 1982, accusing them of running him off the road. *Id.* at 158-94.

The State also presented evidence during the punishment phase that approximately one hour after killing Guerrero, Drag on robbed a Conoco station at gunpoint. He bound the store clerk and her boyfriend with tape, fondled the store clerk, and threatened to sodomize and kill them both. Drag on stoke the boyfriend's wallet, which contained identification. 6 Tr. at 313-53, 372-76, 7 Tr. at 411-43. Drag on left the Conoco station, Drag on stole the boyfriend's car, and drove to the boyfriend's apartment. An item stolen from the boyfriend's car was later found in a trailer belonging to Draughon's girlfriend. 6 Tr. at 396-402. The jury heard that Drag on was arrested the night after the murder, while robbing another Long Silver's restaurant. 7 Tr. at 447-89.

John Wesley Webber, a prisoner incarcerated on the same Harris County Jail block as Drag on, tstified that he heard Drag on, testified that he heard Drag on say that he would try to escape from prison if he was sentenced to death. 5 Tr. at 220-25. Webber also testified that he rejected the prosecutor's offer to write a letter to the Board of Pardons and Paroles advising the Board that Webber had testified for the State. *Id.* at 234-35.

Drag on presented evidence in mitigation of punishment. The jury heard that Drag on was six years old when his father deserted the family. Draughon's mother remarried when Drag on was approximately ten years old and two years later, the family moved to Texas. Draughon's stepfather was an alcoholic who

abused his wife and her children. Draughon's mother was hospitalized several times as a result of beatings. Drag on was protective of his mother and sometimes intervened in fights between his mother and stepfather. Draughon's stepfather was arrested for molesting Draughon's younger sister.

On several occasions, Draughon's stepfather kicked him out of the house. The first time occurred when Drag on was twelve years old. Drag on went to Florida to live with his biological father and stayed for four years, but his father provided little supervision. Drag on began skipping school to go to the beach and drink beer with friends. Drag on returned to his mother 's home when he was sixteen years old. His stepfather charged him rent when he returned to the house.

Draughon's mother and sister described Drag on as loving, kind, and protective. 7 Tr. at 594-615, 8 Tr. at 659-68. Family friends also described Drag on as thoughtful and polite. 8 Tr. at 702-60.

Drag on testified on his own behalf during the punishment phase of the trial. Drag on offered his version of the 1982 incident in which he accosted two men with a knife, stating that he did not become belligerent or reach for his knife until one of the men turned hostile and threatening. Drag on pleaded guilty to a misdemeanor assault charge for that incident and received a six-month jail sentence. 9 Tr. at 828-82.

Drag on offered evidence of his drug use during the sentencing phase of his trial. The evidence showed that Drag on began using cocaine after moving in with his girlfriend, Elaine Coons, the sister of Kenneth Gafford, Draughon's accomplice in the robbery. Coons testified that she and Drag on were injecting cocaine when he went off on the crime spree that included

Guerrero's murder. Coons testified that Drag on would become "hyper" when he was on cocaine. 8 Tr. at 795-99.

Drag on explained the events that led to the shooting. Kenneth Gafford had formerly worked for the Long John Silver's and knew how the restaurant was set up and how the safe and alarm system worked. His information led to the planned robbery.

Drag on testified that he saw a crowd forming outside the restaurant during the attempted robbery, became nervous, and ran out the back door toward the pickup truck where Gafford was waiting to drive away. The pickup was parked near the back of the restaurant. As Drag on neared the truck, he turned and saw several people chasing him. Drag on testified that he dove into the back of the truck bed, leaned over the railing, and fired four shots. He testified that he aimed over the heads of the crowd and was only trying to scare people so they would stop chasing him. Drag on did not know that he had shot Guerrero. 9 Tr. at 896-974. Drag on offered no expert ballistics testimony in his defense. Charles Anderson, Firearms Examiner for the Houston Police Department, testified that nothing on the bullet recovered from Guerrero. 10 Tr. at 1161.

At the conclusion of the evidence, the trial court instructed the jury to answer the two statutory special issues on sentencing: 1) whether Draughon's conduct that caused Guerrero's death was committed deliberately and with the reasonable expectation that the death of Guerrero or another would result; and 2) whether there was a probability that Drag on would commit future criminal acts of violence that would constitute a continuing threat to society. The jury answered both questions in the affirmative. The court sentenced Drag on to death. *Id.* at 53.

The Texas Court of Criminal Appeals affirmed Draughon's conviction and sentence on May 13, 1992. The Supreme Court of

the United States denied his petition for a writ of certiorari on June 28, 1993. *Drag on v. Texas,* 509 U.S. 926 (1993). A motion for rehearing was denied on August 26, 1993. Drag on filed a habeas application in the state court on September 2, 1994. The state court denied Draughon's discovery requests, including a reques to inspect the fatal bullet; declined to hold an evidentiary hearing; adopted the state's proposed findings of fact and conclusions of law; and recommended denying relief. SH. at 455-70, 491-507, 560-604.[10] On May 9, 2001, the Texas Court of Criminal Appeals adopted the trial court's findings of fact and conclusion of law and denied relief. Drag on filed this federal habeas petition on May 6, 2002

II. The Applicable Legal Standards

A. The Antiterrorism and Effective Death Penalty Act

The Antiterrorism and Effective Death Penalty Act ("AEDPA") became effective on April 24, 1996 and applies to all federal habeas corpus petitions filed on or after that date. *See Robertson v. Cockrell,* 325 F.3d 243, 247 (5th Cir. 2003), *cert. denied,* ____ U.S. ____, 124 S.Ct. 28 (2003). Nonetheless, Drag on argues that his petition should not fall under AEDPA because the Texas courts took over six years to decide his state postconviction challenge. Drag on argues that the state courts took over six years to decide his state postconviction challenge. Drag on argues that the state courts took over three years longer than they should have to decide his case and that without this delay, the state court decision would have issued in time for Drag on to file his federal habeas petition before April 24, 1996. Drag on claims that the state intentionally delayed deciding his habeas application so that he could not file his federal petition until after the AEDPA, with its

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[10] "SH." refers to the transcript of Draughon's State habeas corpus proceeding.

standards of deference to state courts, became effective.

The record does not support Draughon's contention that the State intentionally delayed resolution of his petition as a tactical maneuver. Draughon's conviction became final on August 26, 1993, when the Supreme Court of the United States denied his motion for rehearing. Drag on did not file his state habeas corpus petition until more than one year later, on September 2, 1994. Drag on amended his petition three months after that, on December 1, 1994. The time that elapsed between Draughon's amended state habeas application and the AEDPA effective date was less than seventeen months, from December 1, 1994 to April 24, 1996, not the seven years that Drag on implies. Moreover, nothing in the record indicates that Drag on complained about any delay in the state court proceedings or requested a scheduling order or other mechanism for swifter resolution.

Drag on provides no evidence that the state ordinarily resolves habeas corpus petitions in capital cases in less than seventeen months. Nor is there evidence to support the argument that his case would have been resolved before April 24, 1996 had the state filed an earlier response. Almost half the time between the date Draughon's conviction became final and the AEDPA became effective had elapsed before Drag on filed his original and amended petitions. Because Drag on took more than fifteen months to file his original and amended petitions, he is in no position to complain that the decision on his state postconviction challenge did not issue before April 24, 1996. The AEDPA standards apply to this petition.

Under the AEDPA, federal habeas relief based on claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal

law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d); *Kitchens v. Johnson,* 190 F.3d 698, 700 (5th Cir. 1999). For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this court may grant federal habeas relief under 28 U.S.C. §2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain,* 246 F.3d 471,475 (5th Cir.), *cert. denied,* 534 U.S. 885 (2001). Under the "contrary to" clause, this Court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by...[the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson,* 230 F.3d 733, 740-41 (5th Cir. 2000) (quoting *Terry Williams v. Taylor,* 529 U.S. 362, 406 (2000)), *cert. denied,* 532 U.S. 915 (2001).[11] The "unreasonable" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should not apply or unreasonably refuse to extend that principle to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Terry Williams,* 529 U.S. ay 406. "In applying this standard, we must decide (1) what was the decision of

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[11] On April 18, 2000, the Supreme Court issued two separate opinions, both originating in Virginia, involving the AEDPA, and in which the petitioners had the same surname. *Terry Williams v. Taylor,* 529 U.S. 362 (2000), involves § 2254(d)(1), and *Michael Williams v. Taylor,* 529 U.S. 420 (2000), involves § 2254(e)(2). To avoid confusion, this court will include the full name of the petitioner when citing to these two cases.

the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson,* 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett,* 239 F.3d 683, 696 (5th Cir. 2001), *aff'd,* 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps,* 537 U.S. 1104 (2003). The only inquiry for a federal court under the "unreasonable application" prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case." *Id.; see also Gardner v. Johnson,* 247 Fed. 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts, in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254 (d)(2); *Hill v. Johnson,* 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied,* 532 U.S. 1039 (2001). The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence.". 28 U.S.C. 2254 (e)(1); *see also Jackson v. Anderson,* 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied,* 522 U.S. 1119 (1998).

Notwithstanding these standards, Drag on argues that the state court's factual determinations in denying his habeas application are not entitled to any deference because that court: 1)

denied his application to proceed *in forma pauperis;* 2) denied his requests for discovery; 3) denied his request for an evidentiary hearing; and 4) adopted verbatim the State's proposed findings of fact and conclusions of law. The AEDPA does not provide for a blanket refusal to defer to state court findings of fact based on claims of error in the state proceeding. Drag on asserts that he did not commit capital murder because the robbery was already complete when he shot Guerrero; that he received ineffective assistance of counsel; that the Texas statutory special issues and jury instructions violated *Penry v. Lynaugh,* 492 U.S. 302 (1989); that the State violated his rights under *Brady v. Maryland,* 373 U.S. 83 (1963; and that the prosecutor misled the jury on the definition of deliberate" in one of the statutory special issues. Each of Draughon's claims, and the appropriate standard of review, mus be examined separately.

B. Procedural Default

"When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson,* 238 F.3d 631, 634 (5th Cir. 2001). The Supreme Court has noted that

> [i]n all cases in which a state prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain,* 128 F.3d 900, 902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51), *cert. denied,* 523 U.S. 1125 (1998); *see also Edwards v. Carpenter,* 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard and be "grounded in concerns of comity and federalism").

C. The Standard for Summary Judgment in Habeas Corpus Cases

" As a general principle, rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson,* 202 F.3d 760, 764 (5th Cir.), *cert. denied,* 531 U.S. 831 (2000). The Federal Rules of Civil Procedure apply to habeas cases insofar as they are consistent with established habeas practice and procedure. *See* Rule 11 of the Rules Governing Section 2254 Cases. In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts in the case in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). If a state court has expressly or implicitly found that a state prisoner's factual allegations are without merit, and the prisoner fails to rebut the presumption of correctness established by 28 U.S.C. § 2254(e)(1) by clear and convincing evidence, the facts are not to be taken in the light most favorable to the prisoner. *See Marshall v.* Lonberger, 459 U.S. 422, 432 (1983); *Sumner v. Mata,* 449 U.S. 539, 547 (1981); *May v. Collins,* 955 F.2d 299, 310 (5th Cir. 1991), *cert. denied,* 504 U.s. 901 (1992); *Emery v. Johnson,* 940 F.Supp. 1046, 1051 S.D. Tex. 1996), *aff'd,* 139 F.3d 191 (5th Cir. 1997), *cert. denied,* 525 U.S. 969 (1998). Absent clear and convincing evidence to rebut the factual

determinations of the Texas state courts, this court is bound by those findings, unless an exception to 28 U.S.C. § 2254 applies.

III. Analysis

A. The Claim that Drag on did not Commit Capital Murder

Section 19.03(a)(2) of the Texas Penal Code defines capital murder to include a murder committed "in the course of committing or attempting to commit ....robbery." Drag on states that because he had already finished robbing the Long John Silver's restaurant when he shot guerrero, the murder was not committed "in the course of committing or attempting to commit...robbery." Drag on argues that the statutory language is too vague to inform ordinary people that a murder committed during flight from a robbery is capital murder, making the statute void for vagueness under the Due Process Clause of the Fourteenth Amendment.[12]

To trace the statutory language: Texas Law defines capital murder to include a murder committed during the commission or attempted commission of a robbery; it defines robbery as a theft in which the robber causes or threatens bodily injury or death; and it defines "in the course of committing theft" as including "immediate flight after the attempt or commission of theft." To apply that language to the facts of this case: Drag on attempted to commit theft in the restaurant; caused bodily injury to the victims (robbery); and shot Guerrero to death (murder) while fleeing from the scene of the robbery ("In the course of committing" the robbery). The

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[12] It also appears that Draughon contends that the evidence was insufficient to convict him of capital murder. His response to the summary judgment motion, however, expressly states that he is *not* raising an insufficiency of the evidence claim. Therefore, this claim will not be addressed.

Texas statutory scheme clearly defines capital murder to include a murder committed during the immediate flight from the commission of a robbery. The statute also clearly includes flight immediately after the commission of a robbery in the definition of "during the course of a robbery." Drag on murdered Guerrero in the course of immediate flight from attempting to rob the restaurant. Drag on committed capital murder within the meaning of the Texas statute.

Drag on argues that if the Texas statute can be applied to his crime, the statute is void for vagueness. "[A] criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). "A law is void for vagueness if persons 'of common intelligence must necessarily guess at its meaning and differ as to its application...." *Smith v. Goguen*, 415 U.S. 566, 572 n.8 (1974) (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)).

The Texas Penal Code defines "robbery" as:

> A person commits [robbery] if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Texas Penal Code § 29.02(a). The Texas Penal Code further provides that:

> In this chapter:
>
> (1) "in the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, *or in immediate flight after the attempt or commission of theft.*

Texas Penal Code § 29.01 (emphasis added). The statute clearly defines immediate flight after the commission of a robbery as being "in the course of committing" the robbery. The statute is not unconstitutionally vague.

B. The Claim that Drag on Received Ineffective Assistance of Counsel

To prevail on a claim for ineffective assistance of counsel, a petitioner

> must show that... counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional normas and must be viewed under the totality of the circumstances. *Id.* at 688. A

court's review of counsel's performance is deferential. *Id.* at 689.

1. Defense Counsel's Failure to Object to the Prosecutor's Comments During Voir Dire

In order to find Drag on guilty of capital murder, the jury had to find that he "intentionally" killed Guerrero. In order to answer the first punishment phase special issue in the affirmative, the jury had to find that he committed the murder "deliberately." During the voir dire examination of the jury panel, the prosecutor illustrated this distinction by giving the panel members the following hypothetical:

> Let's suppose you're driving down the street and as you get underneath, you're going right under the speed limit, so you're moving pretty fast, and as you get right under the stop light it changes from green to yellow and you decide to go on through the intersection, not to hit the brakes. That's an intentional going through the intersection.
>
> But if you're about ten feet back, it turns from green to yellow, then you have that split second to decide not to hit the brakes. So, then, it's not only intentional but also deliberate as you go on through ...
>
> But if you decide a block back that you are going to run the light because you're late, then that would be more like premeditation.

VD at 3654-55.[13] The prosecutor gave substantially similar Hypotheticals to other prospective jurors. *See id.* at 1025-26, 1212-13, 1993-94, 2078-79, 2361-63, 2453-54, 2764-66, 4160,4476-77. Drag on argues that these illustrations confused the jury about the distinction under Texas law between intent and deliberateness.

Texas law distinguishes between "intentional" and "deliberate." While a defendant may be convicted of capital murder for *intentionally* killing a person during the course of a robbery, he may not be sentenced to death unless the killing was *deliberate*. "A capital venireman who cannot distinguish between an 'intentional' and a 'deliberate' killing has demonstrated an impairment in his ability meaningfully to reconsider guilt evidence in the particular context of [punishment phase] special issue one." *Martinez v. State,* 763 S.W.2d 413, 419 (Tex. Crim. App. 1989) (*en banc*).

The state habeas court found that the illustrations the prosecutor used during the voir dire examination did not misstate Texas law. SH. at 589-90¶¶10-11. The issue before this court is not whether there was an error under state law, but rather whether a federal constitutional right was violated. *Weeks v. Scott,* 55 F.3d 1059 (5th Cir. 1995). The record shows no basis for concluding that Draughon's counsel was deficient in failing to object to the Hypotheticals, or that any objection would likely have been sustained. Drag on has not shown either deficient performance not prejudice from the failure to object; he is not entitled to relief on this claim.

2. The Failure to Retain a Ballistics Expert

At trial, the theory of Draughon's defense was that he did not intend to kill Guerrero. Drag on testified that he ran from the

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[13] "VD" refers to the transcript of jury voir dire.

restaurant jumped into the getaway vehicle, and fired warning shots over the heads of the crowd to scare them off. The prosecution's theory was that Drag on ran approximately ten steps, turned, aimed his gun into the crowd, and shot, intending to hit someone.

This court help an evidentiary hearing on February 26, 2004, at which Drag on presented expert ballistics testimony. Drag on had attempted to develop such evidence in his state habeas application, but the state habeas court denied his requests for the release of the fatal bullet and other ballistics-related evidence and denied all Draughon's discovery request. SH. at 455-70. Drag on exercised due diligence in seeking to present this evidence to the state habeas court. Draughon exercised due diligence in attempting to develop this evidence in the state court removes his case from the strictures of 28 U.S.C. § 2254(e)(2). "[A] failure to develop the factual basis of a claim is not established unless there is a lack of diligence..." *Michael Williams v. Taylor,* 529 U.S. 420, 430-32 (2000). "Diligence...depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court..." *Id.* at 435.

Lucien Haag, a certified criminalist, testified at the evidentiary hearing in this court.[14] Haag has particular training and expertise in firearms evidence. E.H. at 10-15.[15] Haag testified that Draughon's counsel asked him to try to determine whether the fatal bullet could have hit a surface or object and ricocheted or deflected before striking Guerrero; to assess the distance from which the

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[14] A criminalist is similar to a forensic examiner, but has broader training and experience. Haag explained, for example, that a forensic examiner might work in only one unit of a crime lab, whereas a criminalist will usually have worked in all sections of the crime lab.

[15] "EH." refers to the transcript of the February 26, 2004, evidentiary hearing.

bullet was fired; to evaluate the quality of the police investigation into Guerrero's death; and to opine on the work a ballistics expert could have done at the time of Draughon's trial. Haag testified that there were criminalists doing such work at the time of Draughon's trial. *Id.* at 19-20.

Haag tested a Raven .25 pistol with a magazine and a single live round of ammunition, and examined a fired bullet. Haag examined the rifling characteristics against those on the fired bullet, which was the bullet retrieved from Armando Guerrero's body. *Id.* at 22-23. Haag noted damage to the fired bullet in the ogive area- the narrower part of the bullet that does not come into contact with the gun barrel. He observed heavy striations over the length of the bullet. Haag testified that the damage was caused by the bullet impacting a flat, unyielding, abrasive surface. Haag concluded that this damage occurred *after* the rifling marks were made, meaning that the striations occurred after the gun had discharged the bullet. Haag concluded that this damage was a consequence of the bullet ricocheting off a hard, flat, unyielding surface, such as concrete or asphalt. Id. at 36-40. Haag concluded that this damage occurred after the gun had discharged the bullet. Haag concluded that this damage was a consequence of the bullet ricocheting off a hart, flat, unyielding surface, such as concrete or asphalt. *Id.* at 36-40. Haag also concluded that the bullet had struck this hard, flat surface at a low angle, estimating it to be five degrees or less, and deflected or ricocheted off this surface before striking Guerrero. Haag opined that this damage would be obvious to any competent firearms examiner. *Id. at 40-41.*

Haag also examined the bullet under a scanning electron microscope ("SEM"). He explained that the SEM gives an examiner greater depth of field and a better view of any particles transferred to the bullet from a ricochet surface. Haag found many grains of mineral material embedded in the bullet. Specifically, he

found grains of quartz and silicon dioxide, which he identified as sand. He also found grains containing silicon, aluminum, and calcium are found in stone, asphalt, or concrete. *Id. at 41-45.* Haag testified that the presence of the particles supported the conclusion that the bullet hit and ricocheted off an abrasive surface before striking Guerrero.

Haag also studied the report of the autopsy performed on Armando Guerrero and testified that autopsy findings were consistent with the findings of ricochet damage to the bullet. The autopsy report stated that the bullet entered Guerrero's body pointing up and to the side. The bullet traveled between two ribs, grazed the heart and stopped inside the chest cavity, penetrating only a few inches into Guerrero's body. Haag testified that a bullet entering soft tissue will ordinarily penetrate ten to twelve inches. If the bullet has ricocheted, however, it will "tumble" rater than going straight, and will not penetrate as deeply as it would with a direct shot. A "tumbling" bullet will also cause an asymmetric abrasion rim on the entrance wound, which was found on Guerrero's body. Haag ran tests on ordnance gelatin and other tissue simulant to confirm these conclusions. *Id.* at 49-51.

Haag also calculated the approximate distance between Drag on and Guerrero when Drag on fired the gun. Haag estimated that the bullet struck an object or surface[16] at approximately a five degree angle and then ricocheted. Haag based the estimate on the condition of, and markings on, the bullet. When a bullet strikes the ground at a five-degree angle, it ricochets from the ground at an angle of one to two degrees. The autopsy report stated that the

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[16] Based on his review of the crime scene, Haag concluded that the ricochet surface was most likely the ground, but he did not definitely rule out the possibility that the bullet ricocheted off another surface, such as a wall. *Id.* at 56-57.

bullet struck Guerrero at a point on his body approximately forty-seven inches above the ground. Based on these figures, Haag calculated the distance the bullet traveled before striking the ground or object from which it ricocheted and the distance the bullet traveled after striking the ricochet surface but before hitting Guerrero. Haag estimated that Drag on stood from thirty to one hundred yards from Guerrero when he fired the gun. Haag could not be more precise about the distance from which Guerrero was shot because the evidence conflicted as to whether Drag on was on the ground or on the truck bed when he fired the gun. In addition, Haag had no information as to whether Guerrero was standing straight up or stopping when he was shot. As a result Haag could only provide estimates of the impact and departure angles of the bullet. *Id.* at 51-61, 94-102.

Dretke argues that Drag on had to have been two hundred feet from Guerrero when he shot. Dretke's position is supported only by assuming that the jury would have indulged every possible inference in favor of the prosecution's evidence as to the relative positions of Drag on and Guerrero, the height from which Drag on shot, and Guerrero's position when he was struck by the bullet. If the issue in this case was the sufficiency of the evidence, this court would resolve all such inferences in favor of the State. The standard for determining prejudice on a *Strickland* claim, however, is whether there is a reasonable probability that the outcome would have been different if the jury had the ballistics evidence. Haag was able to present ballistics evidence that the jury did not hear that supported the conclusions that Drag on shot Guerrero at a distance from thirty to one hundred yards and did not fire directly toward Guerrero or into the crowd.

Amicus curiae Jan Krocker, the original trial prosecutor, submitted affidavits in response to Haag's testimony. The affidavit of Charles Anderson, the prosecution's expert witness at

Draughon's trial, disagrees with Haag's conclusions. Specifically, Anderson claims that any ricochet would have demolished the bullet, and that the cartridge case did not contain enough power to propel it the distance that Haag claims. Anderson also offers alternative explanations for the deposits Haag found in the bullet, including the possibility that lint or dust in Draughon's pocket could have entered the gun muzzle and impacted the bullet on firing. Second Anderson Aff.at¶¶5-10. Anderson also contends that the shape of the entry wound undercuts Haag's conclusion that the bullet ricocheted. Anderson Aff. at 1. The only exhibit attached to either of Anderson's affidavits in his curriculum vitae.

Haag responds that Anderson bases his conclusions in part on an incorrect assumption as to the tests Haag conducted. Anderson assumed that Haag did not test fire a CCI Blazer brand of .25 automatic ammunition in his tests. In fact, Haag used the CCI Blazer brand, and three other brands of ammunition, in conducting both the ricochet and tissue simulant penetration tests. All four brands of ammunition showed similar ricochet damage, postimpact tumbling behavior, and low penetration in tissue simulant. Haag Aff. at ¶ 2. Haag states that his tests with the CCI Blazer bullets demonstrate that Anderson's claim that a ricochet impact would have mutilated the bullet is untrue. Haag reiterates that the marks found when these bullets ricochet at a low angle off a hard, unyielding surface, "are excellent copies of the impact damage suffered by the fatal evidence bullet." Haag also notes that Anderson conducted no tests or experiments to support his claims. *Id.* at ¶ 4.

Haag also sharply disagrees with Anderson's conclusion that the skid marks on the bullet could have come from dust, lint, or pocket debris in the gun barrel. Haag states that he conducted his own experiment in response to Anderson's claim by "placing an obvious and egregious amount of abrasive soil and mineral material

in the muzzle of a Raven .25 Automatic pistol and then discharging a 50-gr. TMJ bullet through this pistol" Haag fired the bullet into tissue simulant, preserving the marks it carried when it left the gun. The bullet shows no skid marks, as defined by Anderson, and no impact damage similar to that on the fatal bullet. *Id.* at ¶ 6 and Exh. C and D.

Haag also disputes Anderson's claim that the powder charge in the cartridge was incapable of propelling the bullet up to one hundred yards. Haag submits the manufacturer's literature on this issue and notes his own relevant professional publications. *Id. at* ¶ 7 and Exh. E. Haag also notes that Anderson testified at Draughon's trial that these bullets were powerful enough to penetrate body armor, 2 Tr. at 384-85, but now claims that they cannot travel one hundred yards with enough energy to kill a person.

Judge Krocker also submits the affidavit of Eric Sappenfield, who holds a Ph.D. in chemistry from Baylor University. Sappenfield disagrees with Haag's SEM analysis. Sappenfield acknowledges that he has not personally analyzed the bullet and cannot determine the accuracy of Haag's conclusions. Sappenfield Aff. at ¶ 5. Sappenfield has no experience or training relating to firearms evidence or bullet ricochets. Haag disputes Sappenfield's assertion that there is no research in the area of bullet ricochets and trace particles found on bullets after ricocheting. Haag cites a presentation from a 2000 AFTE seminar as an example of such research and notes that he has presented numerous workshops on the subject. Haag Aff. at ¶¶ 14-20.

Judge Krocker also offers the affidavit of Dwayne A. Wolf, M.D., Deputy Chief Medical Examiner of Harris County. Wolfe asserts that the gunshot wound could not have been from a ricochet bullet because the entry wound was round. Wolf asserts that a ricochet would deform the bullet and cause an irregularly shaped

wound. Wolf Aff. at ¶ 3. Wolf further claims that neither the distance from which the bullet was fired nor its velocity can be demonstrated by the depth of the bullet penetration in a victim's body. Id. at ¶ 5.

In response, Haag cites his own tests and evidentiary hearing exhibits, demonstrating that a ricochet bullet can produce a round entry wound. Haag Aff. at ¶ 11. Haag explains that a ricochet bullet "tumbles," much like a baton twirler's baton. Just as a baton can strike the ground end-first, a tumbling bullet can strike at a nose-first attitude and produce a round entry wound. Haag states that in only three ricochet test shots into cardstock witness panels, he produced multiple round holes. Haag Aff. at ¶ 21. Haag refers to specific tests he performed, which demonstrated that a bullet could substantially maintain its structural integrity after a low-incident angle ricochet, to dispute Wolf's statement that a ricocheting bullet would be deformed. Haag also notes that Wolf has no training or experience in forensic ballistics or bullet ricochet and performed no tests to support his claims. Id. at ¶ 22. Finally, Haag cites his own tests, as well as common sense, to dispute Wolf's assertion that distance and velocity have no effect on the depth to which a bullet will penetrate a target.

a. The Absence of Ballistics Evidence in the Guilt Phase

Drag on argues that ballistics expert would have testified that the guilt/innocence phase of the trial that the fatal bullet was fired at a substantial distance from the victim and ricocheted off something before striking Guerrero. Drag on contends that this would provide physical evidence to support his position that the killing was unintentional and would have caused the jury to find that he did not commit capital murder.

Tex. Penal Code § 19.03(a)(2) provides that "[a] person

commits [capital murder] if he commits murder as defined under Section 19.02(b)(1) and...the person *intentionally* commits murder under in the course of committing or attempting to commit...robbery...." (Emphasis added). Section 19.02(b)(1) defines murder as "intentionally or knowingly causing the death of an individual...." Intentionally" means "it is his conscious objective or desire to...cause the result." Tex Penal Code § 6.03(a). To be guilty of capital murder, Drag on must have intended to kill someone during the robbery. *See, e.g., Hughes v. State*, 897 S.W.2d 285, 294-95 (Tex.Crim.App.) (*en banc*) (holding that the *mens rea* element of the capital murder statute applies to the *result* - "causing the death of an individual" - and *not* to the conduct, - firing his gun), *cert. denied*, 514 U.S. 1112 (1995).

Where a killing during the course of a robbery is accidental, the defendant is guilty of felony murder, not capital murder. The distinguishing element between felony murder and capital murder is the intent to kill. Felony murder is an unintentional murder committed in the course of committing a felony." *Fuentes v. State*, 991 S.W.2d 267, 272 (Tex.Crim.App.), *cert. denied*, 528 U.S. 1026 (1999) (citations omitted). Felony murder is a lesser included offense a capital murder, and a defendant has a right to a jury charge on felony murder "if there was *some* evidence that [he] had the intent to commit the robbery, but not the murder." *Adanandus v. State*, 866 S.W.2d 210, 231 (Tex.Crim.App. 1993), *cert. denied*, 510 U.S. 1215 (1994).

Defense counsel's decision not to present expert ballistics testimony at the guilt-innocence phase cannot be justified as a valid strategic choice. Evidence in the record indicates that trial counsel had at least some understanding of the potential importance of ballistics evidence. During Draughon's state habeas proceeding, his lead trial counsel submitted an affidavit stating that he and Draughon's cocounsel "discussed in great detail the circumstances

of his case, including the evidence for an against him, witness statements, defenses, and trial procedure." Cocounsel also submitted an affidavit, stating that he

> recalls conducting a thorough investigation about the deliberateness of [Draughon's] offense. I traveled to the scene of the offense and obtained photographs and measurements. I studied the exterior of the building for evidence of bullet strikes. In addition...I made a thorough review of the prosecutor's file and States [sic] evidence against Drag on.

Notably, neither attorney states that he examined the fatal bullet, asked an expert to examine the bullet, or made any inquiry into the strength or weaknesses of the State's expert ballistics testimony.

As Haag's testimony demonstrates, expert ballistics analysis would have provided physical evidence supporting Draughon's claim that he intended to fire over the heads of the crowd and slow or stop their pursuit, but that he did not intend to kill anyone. In the absence of this evidence, Draughon's defense theory lacked physical evidence in support. Draughon's only evidence was his own testimony and that of his accomplice. Their testimony, easily dismissed as self-serving, was contradicted by the testimony of the State's ballistics expert, who testified that there was no evidence that the bullet ricocheted. The State's ballistics evidence supported the prosecutor's argument that Drag on deliberately fired into the crowd. Defense counsel presented no expert ballistics testimony or evidence such as Haag has submitted, to support the only defense to capital murder Drag on could have raised.

The mere fact that counsel may have known that ballistics

evidence could be helpful, yet decided not to present such evidence, does not establish that it was reasoned, tactical decision. "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to. . . strategy." *Wiggins v. Smith*, 539 U.S. 510, ___, 123 S.Ct. 2527, 2538 (2003). Rather, as *Wiggins* makes clear, the decision not to investigate further is reasonable only to the extent that counsel's investigation leads to the conclusion that further investigation would be futile. In this case, there is no evidence that counsel obtained any expert advice on whether ballistics analysis of the fatal bullet would have been helpful. The bullet was clearly the best – indeed, the only – piece of physical evidence available to Drag on.[17] Counsel was deficient in not seeking such expert assistance.

In determining prejudice, "the question is whether there is a reasonable probability that, absent the errors" the jury would have reached a different conclusion. *Strickland*, 465 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* At 694. The ballistics evidence presented during the evidentiary hearing establishes existed that would have supported Draughon's defense theory and would have allowed the jury to find a lack of intent. Had the jury done so, Drag on would have ben convicted of felony murder, not capital murder.

The affidavits submitted by Judge Krocker do not alter this

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[17] Contrary to Dretke's argument in his posthearing brief, Haag's testimony does not contradict Draughon's testimony that he attempted to fire above the heads of the crowd. Drag on testified that his arm was jostled when the truck began to move. He could have intended to fire over the crowd but lost his balance when the truck moved, causing him to fire in a downward direction with the bullet ricocheting off the ground. Haag testified that the ground was the most likely ricochet surface, but that he could not eliminate other possibilities, such as a wall, as the ricochet surface.

analysis. Setting aside questions about the expert qualifications of some Judge Krocker's witnesses and the relative credibility of Haag and Judge Krocker's affiants, the affidavits, as most, show that experts might disagree about some of the forensic evidence. It is not Draughon's burden in this petition to demonstrate definitively that the ballistics evidence would have changed the outcome of his trial. Drag on must show that the evidence not presented by his trial counsel raises "a probability sufficient to undermine confidence in the outcome" of his trial. *Strickland*, 465 U.S. at 695. A jury could have believed the ballistics evidence presented at the evidentiary hearing in this court, even in the face of Judge Krocker's rebuttal evidence. If the jury did not credit Haag's testimony, the verdict would be guilty of felony murder, not capital murder. The evidence is sufficient to undermine confidence in the jury's finding that Drag on committed capital murder. Drag on satisfies the *Strickland* prejudice prong.

The state habeas court's finding to the contrary was an unreasonable application of federal law. The state court concluded that:

> [c]ounsel cannot be held ineffective based on possibly differing expert opinions concerning the trajectory of the bullet, especially in light of the overwhelming evidence that [Drag on], armed with a deadly weapon, entered a restaurant with the intent to commit an aggravated robbery and that [Drag on] shot a witness as [he] fled from the scene.

SH. at 588 ¶ 7. By refusing to allow Drag on any discovery, including access to the fatal bullet, the state habeas court prevented Drag on from developing ballistics evidence that could have supported his defense theory. The state habeas court concluded that ineffectiveness could not be shown on the basis of possibly differing expert opinions, without knowing what Draughon's expert

evidence would show. The state habeas court instead relied on the blanket proposition that possibly differing expert testimony could not provide the basis for an ineffective assistance of counsel claim if evidence is consistent wit the jury's verdict. In this case, however, the evidence could also be consistent with Draughon's theory of defense, that he committed felony murder, not capital murder. The Fifth Circuit has explained that "it is the court's task to see what [expert] evidence might have been adduced and to gauge any prejudice resulting from trial counsel's failure to present it" *Pondexter v. Dretke*, 346 F.3d 142, 149 n.11 (5th Cir. 2003), *cert. denied*, ____U.S.____, 124 S.Ct. 2160 (2004) (internal quotation marks omitted). The Supreme Court has clearly defined the relevant standard as "a reasonable probability that, absent the errors" the jury would have reached a different conclusion. *Strickland*, 465 U.S. at 695. Expert testimony that could have been, but was not, presented to the jury is relevant to this determination. The state habeas court's conclusion that conflicting expert testimony could not serve as the basis for an ineffective assistance of counsel cl aim was an unreasonable application of the *Strickland* standard.

The other evidence cited by the state court proves only that Drag on is guilty of felony murder; it is not dispositive on the critical element of intent necessary to the jury's findings that Drag on is guilty of capital murder. Drag on is entitled to relief on this claim.

b. The Absence of Ballistics Evidence in the Punishment Phase

Draughon's jury was required to determine "whether the

conduct of the defendant that caused the death of the decedent was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. . . ." Tex. Code Crim. Pro. 37.071. Drag on argues that the forensic evidence would have established that he did not act "deliberately and with the reasonable expectation that the death of the deceased or another would result." A negative jury answer to this special issue would have resulted in a life sentence. *Id.*

The evidence presented in this court raises serious questions about whether Drag on fired directly at the crowd and the distance from which he fired. The prosecution argued that Drag on ran between ten feet to ten running steps, turned, and fired directly at the crowd. Drag on claimed that he attempted to fire warning shots over the heads of the crowd, from a much greater distance, but his arm was jostled as the truck began to move. Haag's analysis and testimony demonstrate that Draughon's counsel had available physical evidence supporting the defense theory, but chose not to call an expert to develop and present that evidence. There is reasonable probability that a jury hearing that evidence would have found that Drag on did not deliberately kill Guerrero. Counsel was deficient in failing to present such evidence at the sentencing hearing and Drag on was prejudiced as a result.

3. The Failure to Develop Evidence of Draughon's Drug Abuse

Drag on next argues that his counsel was ineffective for failing to investigate the effect of his drug abuse on his brain and for failing to retain an expert in pharmapsychology. More specifically, Drag on contends that his heavy drug use near the time of the murder affected his mental capacity, making him "virtually indistinguishable from an individual with a diagnosis of paranoid schizophrenia. . . ." He submits an affidavit by Dr. Paula Lundberg-

Love, stating that Drag on acted under a cocaine-induced psychosis. Drag on claims that this evidence would have been relevant at both the guilt-innocence and sentencing phases of his trial. Drag on argues in the alternative that the Texas capital sentencing statute interfered with his counsel's ability to present evidence of intoxication at the sentencing phase, making his counsel ineffective.

The state habeas court rejected this claim on the ground that counsel did introduce evidence of Draughon's drug use through the testimony of Draughon's girlfriend and family. Affidavits submitted by counsel stated that counsel interviewed Drag on and his family and friends and presented evidence of drug abuse through their lay testimony. The state habeas court also noted that a psychopharmacological examination submitted in the habeas proceeding labeled Drag on as violently psychotic.

a. The Absence of Evidence of the Effects of Drug Use in the Guilt Phase

Despite his effort to elevate this claim to something akin to an insanity defense, Draughon's argument it at bottom that his voluntary ingestion of drugs altered his mental state. Voluntary intoxication is not a defense under Texas law. Tex. Penal Code § 8.04(a). Even if counsel was deficient in failing to obtain expert testimony on the effect of Draughon's drug use, Drag on suffered no resulting prejudice at the guilt-innocence phase of his trial.

b. The Absence of Evidence of the Effects of Drug Use in the Punishment Phase

Evidence of temporary insanity caused by intoxication may be offered in mitigation of sentence. Tex. Penal Code § 8.04(b).

Drag on argues that his counsel was ineffective for failing to present expert evidence of intoxication in his mitigation case. As Drag on acknowledges, however, evidence of his drug abuse was double-edged. The evidence could mitigate his culpability, but could have led the jury to believe that Drag on was susceptible to drug abuse and would become violent if he abused drugs again. Dr. Lundberg-Love concluded that Drag on acted under a cocaine-induced psychotic disorder and that his violent conduct would end after substance abuse treatment. Lundberg-Love Affidavit at paragraphs 21-25. Those conclusions are contradicted by Draughon's own trial testimony. Drag on testified that cocaine merely made him hyperactive, rambunctious, and talkative; he did not claim that it made him violent. 10 Tr. at 1102. Drag on also testified that he began committing robberies after he was released from jail and list his job, 9 Tr. At 900-04, and that he bought his pistol because he thought it would be more useful than a knife in scaring the victims of his planned robberies, 10 Tr. At 1020-21. This suggests a methodical plan to intimidate victims more effectively, not specifically tied to a "cocaine-induced psychotic disorder."

In light of both the double-edged nature of the evidence and the contradictions between his own testimony and Dr. Lundberg-Love's conclusions, Drag on cannot demonstrate a reasonable probability that evidence of a "cocaine-induced psychosis" would have resulted in a different sentence. He cannot meet the prejudice prong of *Strickland* and is not entitled to relief on this claim.

Drag on also complains that the Texas statute hampered him from presenting mitigating evidence regarding his drug abuse because the jury might have seen it as evidence of a propensity to commit future acts of violence. Drag on claims that "[b]y interfering with the ability of counsel to make independent decisions about how to conduct the defense, the State of Texas deprived Drag on of his right to effective assistance of counsel."

The Fifth Circuit has rejected a similar argument:

> [C]ounsel's tactical decision in sentencing proceedings, including capital proceedings, "are always channeled by the requirements f the statute under which the state proceeds." [*May v. Collins*], 948 F.2d [162,] 167 [5th Cir. (1991)]. A rule under which a defendant could show a Sixth Amendment violation simply because the statute triggers certain tactical decisions would lead to limitless claims of ineffective assistance.

Black v. Collins, 962 F.2d 394, 407 (5th Cir.), *cert. denied*, 504 U.S. 992 (1992). The issue presented in *Black* was very similar to the issue Drag on presents:

> Black argued to the district court that the structure of the Texas capital sentencing scheme "interfered in certain ways with the ability of counsel to make independent decisions about how to conduct the defense, "*Strickland*, 466 U.S. at 686, 104 S.Ct. at 2063, thus violating his Sixth Amendment right to counsel.

Black, 962 F.2d at 407. The Fifth Circuit rejected the claim in *Black*. That precedent leads this court to reach the same result.

4. The Failure to Cross-Examine Ricardo Guerrero on a Prior Inconsistent Statement

Drag on argues that his counsel did not adequately cross-examine Ricardo Guerrero, who testified as a prosecution witness.

Guerrero testified that Drag on ran past him after exiting the restaurant, turned around, and shot. Guerrero threw himself to the ground, then heard more shots. Drag on argues that his trial counsel should have cross-examined Guerrero based on a prior inconsistent statement. Drag on bases this argument on some typewritten notes from an unidentified police officer stating, among other things, that Guerrero was standing about two hundred feet from the restaurant at the time of the shooting, that Drag on was about fifty feet away, and that Drag on fired at a group of men running toward him. The state habeas court found that defense counsel did attempt to impeach Guerrero during cross-examination, but could not have used the police officer's notes because they were inadmissible hearsay. SH. At 592 ¶ 16. This federal habeas court does not review the Texas court decision on the application of Texas law. Because the notes were inadmissible hearsay as a matter of Texas law, trial counsel was not ineffective for failing to attempt to introduce inadmissible evidence. The record does not support a finding that counsel was deficient or that had he succeeded in introducing the evidence, it would have had any effect on the outcome. This claim is without merit.

5. The Failure to Present Evidence of Draughon's Childhood Deprivations

Drag on contends that his counsel did not do enough to investigate and present evidence of the abuse he suffered as a child. Drag on claims that his failure constituted ineffective assistance at both the guilt-innocence and penalty phases of the trial.

a. The Lack of Certain Mitigating Evidence in the Guilt Phase

Drag on does not show how additional evidence of his abusive upbringing could have changed the outcome of the guilt-

innocence phase of his trial. The issue in the guilt-innocence phase was whether Drag on committed the acts alleged in the indictment. Drag on does not content that evidence of abuse, if properly presented, would have given rise to an insanity or diminished capacity defense. Drag on has not shown any deficient performance by counsel or prejudice resulting from counsel's performance in failing to discover or present evidence of childhood abuse.

b. The Lack of Certain Mitigating Evidence in the Penalty Phase.

The state habeas court found that Draughon's counsel did present mitigating evidence of his family background, including his abuse stepfather, the poor supervision he received while living with his biological father, sexual abuse within his family, and his social background. While Drag on now claims that experts could have presented additional mitigating evidence on these subjects, he does not identify that evidence; explain how it would by anything but cumulative; or explain how it would have altered the outcome.

The Fifth Circuit has held that "complaints based upon uncalled witnesses [are] not favored because the presentation of witness testimony is essentially strategy and this within the trial counsel's domain, and . . .speculations as to what these witnesses would have testified is too uncertain." *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (citing *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984)). Drag on has shown neither deficient performance nor prejudice as a result of his counsels' decision not to present unspecified additional or expert testimony on childhood abuse at the penalty phase of the trial.

6. The Failure to Interview Eyewitnesses

Drag on claims that his counsel failed to interview several eyewitnesses to the shooting, including several witnesses identified in police reports. Drag on does not identify these eyewitnesses or the substance of any testimony they would have given. The state habeas court rejected this claim on the ground that Drag on provided no proof that his counsel had failed to interview witnesses. In an affidavit, Draughon's trial counsel specifically states that he discussed witness statements with Drag on. The state habeas court's rejection of this claim is reasonable based on the record and is entitled to deference. The claim also fails on the merits because Drag on makes no showing that any specific witnesses would have testified or would have provided testimony helpful to his case. *See Alexander*, 775 F.2d at 602.

On a claim of ineffective assistance of counsel, review of counsel's performance must be highly deferential. *Strickland,* 466 U.S. at 689. The decision of which witnesses to call at trial is especially entitled to deference under *Strickland* "because the presentation of witness testimony is essentially strategy and thus within the trial counsel's domain." *Id.* Drag on is not entitled to relief on this claim.

7. The Failure to Object to the Prosecutor's Comments

Drag on contends that the prosecutor made numerous improper statements during the voir dire examination and during closing argument, and that defense counsel was ineffective for failing to object. Drag on identifies four statements that he claims the prosecutor used to inject her own feelings and beliefs and appeal to the passions and prejudices of the jurors. The statements are:

> (1) [I]n Harris County you people have a choice. Either we all run and we turn over our city to people

like Martin Drag on or else we can stay here and clean up this crime. We can take Houston off the top of the list which says the crime capital of the south because we can't all run like Ed and Keri. I'm not going to turn around and run and I hope to God you're not going to turn around and run.

(2) All of this reminds me about a little girl I saw one time who was testifying in a trial. The trial itself is not important here, but I remember. I was a law student at the time. It made a great impression on me because that little girl came up to the witness stand and she was carrying a doll and the prosecutor said, just trying to get her to relax and feel comfortable, the prosecutor said how come you brought your doll into the courtroom, you know, and the little girl said because my doll is too scared to stay out in the hall. What this trial is about is we don't want our kids to grow up being scare to death.

(3) I ask you, please, for an answer of yes to that question 1 and I ask you for answer of yes to that question 2, and I did it for one reason and that is because I swear to God the evidence in this case says that they got to be yes.

(4) You know what is absolutely infuriating about this case is that people in our community cannot go to work, some of them working just above the minimum wage to support themselves and to support their kids and their families, without somebody like Martin Allen Drag on coming in a stocking mask and terrorizing them.

Drag on also complains that the prosecutor made statements about Draughon's thoughts and motivations, saying, for example, that he "enjoyed playing the bad guy" and "liked having a stocking mask and looking as frightening as possible," which were not supported by the evidence. The state habeas court found that these statements were permissible pleas for law enforcement and reasonable inferences from the evidence, within the limits Texas law imposed on prosecutorial arguments.

During the voir dire examination, the prosecutor made several references to a possible confession by Drag on. The prosecutor told the jury that "there may or may not be a confession" and that she "may or may not want to make" a confession part of her case. During trial, the prosecutor did not offer any confession into evidence. The prosecutor also asked prospective jurors during the voir dire whether they would hold it against the State if it offered no confession. Drag on argues that the prosecutor's argument was improper because it led the jury to believe that he had confessed. The state habeas court found that these statements, coupled with the question, were proper attempts to determine if a prospective juror had a bias or prejudice that would make it difficult to apply the law. SH. At 595 ¶ 25 (citing Tex. Crim. Pro. Art. 36.16(b)(3))

In closing argument during the penalty phase, the prosecutor stated:

> I would remind you that your job here is not to make a decision about whether or not the defendant receives the death sentence or serves life in prison but to follow the law and the evidence . . . .

The state habeas court rejected Draughon's claim that this argument was improper, on the ground that it was a reminder to

jurors to follow their oath and answer the special issues based on the evidence and the instructions on the law.

Improper remarks by a prosecutor rise to the level of a constitutional violation only where the remarks are so prejudicial that they make a trial fundamentally unfair. *See Darden v. Wainwright,* 47u U.S. 168, 181 (1986). In light of the overwhelming evidence that Drag on shot Guerrero during an attempted robbery and the evidence of Draughon's violent crime spree before and after the Guerrero murder, there is no reasonable possibility that these comments had an impact on the outcome. Even if defense counsel should have objected to the comments, Drag on suffered no prejudice as a result of counsel's failure to do so.

Draughon's challenge to the prosecutor's comment that it was not the jury's job to determine whether Drag on was to receive a death sentence, but merely to follow the law, appears to invoke *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the prosecutor told the jury that the final responsibility for the decision to sentence the defendant to death did not rest with them, but with the appellate courts that would review their decision. The Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. In *Dugger v. Adams*, 489 U.S. 401 (1989), however, the Court clarified its holding in *Caldwell,* stating that to "establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Id.* at 407; *accord Sawyer v. Butler*, 881 F.2d 1273, 1285 (5th Cir. 1989) (en banc), *aff'd*, 497 U.S. 227 (1990). The record reveals that the prosecutor did not improperly describe the role assigned to the jury by local law; rather, she expressly admonished the jury to

follow the law. There was no *Caldwell* violation and neither deficient performance nor prejudice in counsel's failure to object.

8. The Failure to Challenge a Prospective Juror

Drag on contends that his counsel's failure to challenge one prospective juror for cause constituted ineffective assistance of counsel. In order to sentence Drag on to death, the jury had to find it "probable" that Drag on would commit future criminal acts of violence that constitute a continuing threat to society. During the voir dire examination, one prospective juror, Michael Cotton, stated that he would vote "yes" on this question if the evidence revealed a ten percent chance of such future acts. 2 VD at 195-96. Drag on argues that this effectively lowered the State's burden of proof on the special issue, making it more likely that Drag on would receive a death sentence if convicted. The state habeas court reviewed Cotton's answers to the questions on voir dire and concluded that he was able to follow the law and instructions given by the trial court; that he understood, and would require the State to meet, the State's burden of proof; and that he could answer the special issues "no" if he thought the State did not merit its burden. Even if counsel was deficient in failing to move to strike Cotton for cause based on his "ten percent" comment, the record does not support a finding of resulting prejudice. The state habeas court's conclusion that the entirety of Cotton's voir dire indicated that he understood the legal burden of proof and would hold the State to its burden is reasonable. The prosecution presented powerful evidence of Draughon's many and exceedingly violent acts. There is little doubt, in light of that evidence, that the State met its burden of proof beyond a reasonable doubt on this special issue. Considering the evidence, Drag on cannot prove that he was prejudiced by the failure to excuse Cotton for cause.

9. The Failure to Object to Certain Testimony and Cross-Examination

For his final claim of ineffective assistance of counsel, Drag on claims that his counsel was ineffective for failing to object to certain medical testimony and to the prosecutor's cross-examination of Drag on. Drag on argues that defense counsel should have objected to the testimony of emergency room nurse Norene Smith about Armando Guerrerro's appearance and condition when he arrived at the hospital and about the medical procedures that were performed. Drag on also argues that his counsel should have objected to the prosecutor's cross-examination after he had testified to his version of the shooting. The prosecutor asked Drag on if two of the witnesses, Eva Cuellar and a police officer, were lying. The testimony of those two witnesses contradicted Draughon's account.

The state habeas court rejected the claim that Smith's testimony should have drawn an objection, finding that her testimony was proper to establish the events and circumstances surrounding the shooting. These included Guerrero's arrival at the hospital, the nature and extent of his gunshot wound, the treatment he received, and the effects of the wound. The state habeas court rejected the claim that counsel was deficient in failing to object to the cross-examination of Drag on, finding that it was a proper attempt to impeach Draughon's credibility under Tex.R.Crim.Evid. 607.

It appears that Drag on bases this ineffective assistance of counsel claim on an alleged violation of the Texas rules of evidence. The state court found that the testimony was proper; it is implicit in that finding that the testimony did not violate the Texas rules of evidence. Drag on has not shown that counsel was deficient in failing to object to the nurse's testimony or the cross-examination of Drag on, or that counsel's failure to object resulted

in prejudice.

10. The Claim of Cumulative Error

Drag on argues that the cumulative effect of these alleged instances of ineffective assistance of counsel entitle him to relief. Even if each individual instance of alleged error, standing alone, is insufficient to justify relief, habeas relief may issue if the cumulative effect of the errors was to deny the defendant due process. *See Derden v. McNeel*, 978 F.2d 1453, 1457-58 (5th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993). To reach the level of a denial of due process, however, the errors must amount to

> the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial.

Lisenba v. California, 314 U.S. 219, 236 (1941) (*quoted in Derden*, 978 F.2d at 1457).

With the exception of the ineffective assistance of counsel claim concerning the lack of expert ballistics testimony (on the basis of which relief is granted), Draughon's claims fail to show deficient performance by counsel, prejudice, or both. The prosecution presented overwhelming evidence, most of which is not contested or disputed, that Drag on shot Guerrero while in flight from attempting to commit armed robbery, as part of a violent and prolonged crime spree. This court has found that expert ballistics testimony could have raised a reasonable doubt as to whether Drag on acted deliberately. Relief is granted on the basis of that specific claim of ineffective assistance. As to the remaining ineffective

assistance of counsel claims, Drag on has failed to show either deficient performance or prejudice. These alleged instances of ineffective assistance of counsel did not, either alone or cumulatively, deny Drag on a fair trial.

C. The *Brady* Claims

Drag on claims that the prosecution failed to disclose a statement by Kenneth Gafford supporting Draughon's claim that he did not fire until reaching the truck and that he aimed upward rather than toward the crowd. Drag on also claims that the State failed to disclose an agreement between the prosecutor and one of the State's witnesses, John Wesley Webber, for the prosecutor to write to the parole board on Webber's behalf.

A prosecutor must disclose evidence favorable to an accused if it "is of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The question is not whether the result would have been different. Rather, it is whether the nondisclosures of material evidence make the verdict unworthy of confidence. In defining the scope of the duty of disclosure, the prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The Supreme Court has explained the three components or essential elements of a *Brady* prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Banks v. Dretke*, ____U.S.____, 124

S. Ct. 1256, 1272 (2004) (quoting *Strickler v. Green*, 527 U.S. 263, 281-82 (1999)).

*1. The **Brady** Claim as to Kenneth Gafford's Statement*

Kenneth Gafford helped plan the restaurant robbery with Drag on and was the driver of the pickup truck in which Drag on fled the murder scene. Police arrested Gafford and Draughon on the same day. Drag on claims that Gafford originally told the police that Drag on did not begin shooting until he arrived at the pickup truck and that he aimed upward. Gafford subsequently changed his statement, according to Drag on, to say that Drag on fired the shots before reaching the truck and pointed his weapon toward the crowd. Drag on claims that the police physically coerced Gafford into changing his statement. He also claims that the State did not disclose Gafford's original statement before the trial.

Gafford testified at the evidentiary hearing in this court. He testified that Drag on reached the truck before he began firing his weapon and that he fired into the air, not toward the crowd. Gafford also testified that he told the Houston Police Department the same thing after his arrest, but changed his story under physical coercion by one of the officers, Detective Dennis Gafford.[18] EH. at 129-31, 139-40.

On cross-examination, Kenneth Gafford admitted that many of his specific claims about how the police physically coerced him to change his account of Draughon's actions did not appear in the affidavit Gafford gave to support Draughon's habeas petition. Gafford testified that the police kicked him in the shins, hit him on

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[18] There is no family relationship between Dennis Gafford and Kenneth Gafford.

the chest, and choked him. Photographs of Gafford taken shortly after the allegedly coercive police interrogation and a videotape of his second, allegedly coerced, statement showed no signs of physical abuse. Gafford claimed he had red marks from being struck, but no evidence of the abuse he claims can be seen on the contemporaneous photographs or videotape. *Id.* at 145-48. Moreover, in his videotaped statement given approximately seven hours after his written statement Gafford stated that he "couldn't tell if [Drag on] was shooting into the people or over the people's [sic] or whatever." *Id.* at 149. This equivocal statement is not helpful to the State. It is not consistent with Gafford's claim that he had been beaten and coerced into telling the police what they wanted to hear.

Lieutenant Gafford testified that he did not see any marks or bruises on Kenneth Gafford and never heard any complaint of physical force. *Id.* at 159. Lieutenant Gafford noted that beating a witness would be cause for firing and would end an officer's career. He specifically denied hitting, choking, or hurting Kenneth Gafford in any way. *Id.* at 165-66. Kenneth Gafford's statement is the only evidence that he was coerced into changing an earlier statement that was exculpatory for Drag on. Kenneth Gafford's testimony at the evidentiary hearing in this court was not credible. A photograph and a videotape both taken within a few hours after police allegedly kicked, struck, and choked Gafford show no sign of physical abuse that would be consistent with his testimony. Gafford's videotaped statement, given after he was allegedly beaten into giving a statement favorable to the State, was not particularly favorable to the State; it was noncommital on the key issue of whether Drag on aimed at the crowd or over the heads of the crowd. Gafford's testimony, which is not credible, is the only evidence Drag on offers in support of this *Brady* claim. The record fails to show that the State suppressed a statement by Gafford that was favorable to Drag on.

2. *The Brady Claim as to John Wesley Webber's Testimony*

John Wesley Webber and Drag on were housed in the same cell block at the Harris County Jail during Draughon's trial. Webber testified at the trial that Drag on told him he would try to escape if sentenced to death. 4 Tr. at 222-24. At trial, the prosecutor told the court and Draughon's counsel that she had told Webber she would write to the Parole Board on his behalf if he testified, but that she had no influence with the Board. The prosecutor also stated that Webber rejected the offer. *Id.* at 217-18. Shortly after the trial, the prosecutor did write about Webber to the Texas Board of Pardons and Paroles. An investigator's note to the prosecutor states: "I have talked to the atty on [Webber's] appeal, Will Outlaw . . . He has no objection if you talk to his client about Drag on. I told him you would not discuss the case on appeal. No deals--Will understan." Draughon claims that this note indicates an agreement between the prosecutor and Webber that Webber's counsel "will understan[d]." Respondent argues that the note means that Webber's counsel, Will Outlaw, would understand that there was no deal, *i.e.* "Will understan[ds]" that no promises have been made. Respondent argues that the "ds" at the end of "understands" was simply cut off when the note was copied. Webber testified at trial that he had no deal with the prosecutor. The State habeas court rejected Draughon's argument that there was no undisclosed "deal" with the prosecutor, in violation of *Brady*. SH. at 604 ¶ 57.

Draughon's evidence supporting this claim consists of the investigator's note and a letter from the Board of Pardons and Paroles acknowledging receipt of a letter from the prosecutor "regarding inmate Webber." The prosecutor's letter was dated twenty days after Webber's testimony and thirteen days after Drag on was sentenced. Although the letter and the investigator's note raise some questions, Drag on did not develop these questions at the

evidentiary hearing before this court. The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998). Drag on has not met this burden. He is not entitled to relief on this claim.[19]

D. The Claim of Ineffective Assistance Of Appellate Counsel

Drag on argues that his appellate counsel was ineffective for failing to raise six separate claims:(1) that the murder did not meet the statutory definition of capital murder because it was not committed during the commission or attempted commission of a robbery; (2) that the evidence was insufficient to establish the requisite intent to kill; (3) that appellate counsel failed to challenge the jury's penalty phase finding that the murder was deliberate; (4) that he failed to raise a claim of actual innocence; (5) that the trial court improperly excused a juror because she expressed reservations about the death penalty; and (6) that he failed to raise numerous claims of prosecutorial misconduct.

A defendant is constitutionally entitled to effective assistance of appellate counsel when he has a right to appeal under State law. *Evitts v. Lucy*, 469 U.S. 387, 395 (1985). Claims of ineffective assistance of appellate counsel are measured under the *Strickland* test. Each of Draughon's claims is examined under this test.

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[19] Draughon's petition is unclear, but it appears that he may also raise due process claims under *Giglo v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U."S. 264 (1959). Draughon did not present either of these claims to the state courts, however. Draughon shows no cause for his failure to present these claims to the Texas courts, nor demonstrates that this court's refusal to address them will result in a fundamental miscarriage of justice. Any such claim is unexhausted.

1. The Claim as to the Statutory Definition of Capital Murder

Drag on argues that his appellate counsel was ineffective for failing to argue that the killing did not meet the statutory definition of capital murder because it was not committed during the commission or attempted commission of a robbery. Drag on raised the underlying claim as a separate claim in this federal habeas petition. This court has found the claim meritless. Appellate counsel's failure to raise a meritless claim did not constitute deficient performance. *See, e.g., Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir., 1995) ("Counsel cannot be deficient for failing to press a frivolous point"); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("This Court has made clear that counsel is not required to make futile motions or objections").

2. The Claim as to the Sufficiency of the Evidence

Drag on claims that the evidence was insufficient to support a finding that he intended to cause death and that his appellate counsel was ineffective for failing to raise this claim. In addressing a sufficiency of the evidence claim, "the relevant questions is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S., 307, 319 (1979) (emphasis in original). Viewed in the light most favorable to the State, the evidence presented at trial[20] showed that Drag on exited the restaurant, ran between ten feet and ten running steps, turned, fired his gun directly at a crowd

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20 For purposes of evaluating this claim, only the evidence presented at trial is relevant. Draughon's appellate counsel did not have the opportunity to develop or present on appeal the ballistics evidence that Draughon' offers in this habeas petition.

of people from a distance of between approximately ten and thirty feet, and killed Guerrero. A rational jury could conclude from this evidence that Drag on intended to kill. An insufficient evidence claim would have been meritless on the basis of the trial record. Counsel was not ineffective for failing to raise the claim.

3. The Claim as to the Jury Finding of Deliberateness

Drag on relies heavily on new evidence, including the statement of Kenneth Gafford, an affidavit by Dr. Paula Lundberg-Love about the effects of his drug use on his mental capacity, and ballistics testimony, to support his claim that he did not act deliberately. This evidence was not available to appellate counsel. Appellate counsel's failure to raise a claim based on this new evidence did not constitute deficient performance.

4. The Claim of Actual Innocence

Drag on argues that his appellate counsel should have raised a claim of actual innocence. If Drag on is using the term "actual innocence" in its plain sense, the claim appears to be a variation on his sufficiency of the evidence claim and is meritless.

Drag on, however, also cites *Sawyer v. Whitley*, 505 U.S. 333, 347 (1992) for the proposition that "[t]he United States Supreme Court recognizes application of 'actual innocence' to the death sentence, not simply the murder conviction." "Actual innocence of the death penalty," as discussed in *Sawyer*, refers to an exception to the procedural default rule. If a petitioner can show that, but for a legal error, he would have been legally ineligible for a death sentence – that he is "actually innocent of the death penalty" – then the habeas court can address the defaulted claim. *Id.* at 335.

Here, however, Drag on appears to assert a claim of actual

innocence as a freestanding claim. It is well-established federal law that actual innocence is not, by itself, a ground for habeas relief. "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). "[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact." *Id.* Drag on cites no Texas law showing that actual innocence would have been a viable claim on direct appeal. To the extent Drag on claims he is actually innocent, that claim relies either on his meritless insufficiency of the evidence argument, or on the new evidence developed in his postconviction proceedings but unavailable to his appellate counsel. Either way, appellate counsel was not ineffective for failing to raise this claim.

5. The Claim as to Excusing a Prospective Juror

Prospective juror Rebecca Fuchs Hale stated during the voir dire examination that she believed that there are situations in which capital punishment is appropriate. *See* VD at 560-64, 571, 601-03, 609. On May 19, 1987, Hale attended a funeral and spent the day with the deceased's family. The same day, she wrote a letter to the trial court stating that she had changed her mind about her ability to impose a death sentence. In response to questions by the judge and the prosecutor, she stated that she would always vote "no" on penalty phase special issue 2. She retreated from this unequivocal stance, however, when questioned by defense counsel, responding that she did not know if she could answer the special issue "yes," and that she felt that she would try to find some way to answer "no." The court granted the State's motion to exclude Hale for cause. VD at 1348-50. Drag on claims that the trial court erred in granting the

motion and that his appellate counsel should have raised the claim on appeal.

The state habeas court rejected this claim. That court found "that [Hale] was substantially impaired in her ability to perform as a juror based on her personal beliefs and her inability to follow the law." The state habeas court further found that appellate counsel was not ineffective in failing to raise this claim because the underlying claim was meritless. SH. at 599-600. The state habeas court's finding that the underlying claim was without merit, which was adopted by the Texas Court of Criminal Appeals, precludes a finding of *Strickland* prejudice. The same court to which the underlying claim would have been presented on direct appeal rejected the claim as without merit on state habeas review. The record and applicable law provides no basis to believe that the same court would have reached a different conclusion on direct appeal.

6. The Claim as to Prosecutorial Misconduct

Drag on contends that his appellate counsel was ineffective for failing to raise the allegedly improper prosecutorial comments that Drag on also asserted as a basis for habeas relief. For the reasons discussed above, the comments by the prosecutor were not grounds for relief. Because the underlying claim provided no grounds for relief, counsel was not deficient for failing to raise the claim on direct appeal and his failure to do so did not prejudice Drag on.

E. The Constitutionality of the Special Issue Jury Instructions

Drag on argues that sentencing phase jury instructions misled the jury about the number of "no" votes on the special issues

necessary to result in a sentence of life imprisonment rather than death, and in its definition of the term "deliberately." Drag on also contends that certain terms in the second special issue are unconstitutionally vague.

The trial court instructed the jury, in relevant part, as follows:

> If ten (10) jurors or more vote "NO" as to any Special Issue, then the answer of the jury shall be "NO" to that issue; and the Foreman will so record the jury's answer by signing his or her name to the finding reflecting such answer on the form provided for that purpose.

Drag on argues that this instruction was erroneous because it led the jury to believe that he could be sentenced to life imprisonment only if ten or more jurors voted "no" on any of the special issues. In fact, a single "no" vote on any special issue would have resulted in a life sentence. Tex. Code Crim. Pro. Art. 37.071.

Drag on relies on the Supreme Court's decision *Mills v. Maryland*, 486 U.S. 367 (1988), holding that a juror may not be precluded from considering any relevant mitigating evidence. In *Mills*, the Supreme Court struck down a requirement that the jury unanimously find that a mitigating factor was present before giving that mitigating factor any weight in sentencing. *Id.* at 378. Drag on argues that the Texas sentencing statute is, in essence, the other side of the Mills coin in that it misleads a juror into thinking that a juror's belief that the state has not proven a special issue beyond a reasonable doubt is of no weight unless nine other jurors agree.

The state habeas court found that this claim was procedurally barred because Drag on had failed to object to the jury instruction on this ground a trial and had failed to request a different instruction.

Accordingly, this court may not review the claim. *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). Even if this claim was not barred, however, it would fail on the merits. In *Jones v. United States*, 527 U.S. 373,380-81 (1999), the Supreme Court addressed a similar challenge to the federal capital sentencing statute. The petitioner argued, and the Court agreed, that the jury's failure to agree unanimously on a sentence of death would pass the sentencing determination to the trial court. The court would then impose a sentence no greater than life imprisonment without the possibility of release. Based on this, the petitioner argued that the Eighth Amendment required the trial court to inform the jury of the effect of a deadlock. The Supreme Court disagreed: "[T]he Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree." Draughon's argument provides no basis for relief.

Drag on argues that the trial court failed to define "deliberately" sufficiently clearly for the jury to distinguish deliberate action from intentional action. He contends that this lack f definition prevented the jury from considering the effects of his drug use during the days leading up to the murder. He also argues that the terms "probability," criminal acts of violence that would constitute a continuing threat to society." Both the Supreme Court and the Fifth Circuit have rejected arguments that the second special issue is unconstitutionally vague.

> *Jurek* [*v. Texas*, 428 U.S. 262 (1976)] expressly rejects the contention that the second punishment issue is impermissibly vague. Id. at 275-76. We have likewise frequently rejected challenges to the lack of definition of diverse terms in the first two punishment special issues. *See Milton v. Procunier*, 744 F.2d 1091, 1095-96 (5th Cir. 1984) ('deliberately," "probability," and "criminal acts of violence" "have a plain meaning of

> sufficient content that the discretion left to the jury" is "no more than that inherent in the jury system itself"), cert. denied, 471 U.S. 1030 (1985); *Thompson v. Lynaugh*, 821 F.2d 1054, 1060 (5th Cir.) ("deliberately" and "reasonable doubt" need not be defined as their "common meaning is sufficiently clear to allow the jury to decide the special issues on punishment"), *cert. denied*, 483 U.S. 1035 (1987); *James* [*v. Collins*, 987 F.2d 1116, 1120 (5th Cir.), cert. denied, 509 U.S. 947 (1983)] (not necessary to define "deliberately," "probability," "criminal acts of violence," or "continuing threat to society"); *Nethery v. Collins*, 993 F.2d 1154, 1162 (5th Cir. 1993) (not necessary to define "deliberately," "probability," or "society"). See also *Pulley v. Harris*, 465 U.S. 37, 50 n.10 (1984) Texas punishment issues are not impermissibly vague as they have "a common sense core of meaning").

Woods v. Johnson, 75 F.3d 1017, 1033-34 (5th Cir. 1996), *cert. denied*, 519 U.S. 854 (1996) (parallel citations omitted).

Drag on argues that the record in this case - particularly the driving hypotheticals the prosecutor offered during the voir dire examination – shows that the distinction between "intentional" and :deliberate" was impermissibly blurred. The state habeas court concluded that "[t]he State's voir dire hypotheticals concerning the difference between intentional and deliberate properly illustrates that a deliberate act involves extra thought process than an intentional act." SH. at 589. The state habeas court's conclusion was reasonable and entitled to deference. The record provides no basis to reject the state habeas court's conclusion.

F. The Claim as to the Trial Court's Instruction on

of intent to achieve the result, not merely intent to engage in the conduct causing the result. Drag on argues that the trial court's instruction on the intent element of murder was flawed because it did not require the jury to find a specific intent to kill. Rather, the instruction required only that the jury find that Drag on intended to engage in the conduct that resulted in Guerrero's death. Drag on contends that this denied him due process by relieving the State of its burden of proving the intent element beyond a reasonable doubt.

The state habeas court found that this claim was procedurally defaulted because Drag on did not request an alternative instruction or make a contemporaneous objection to the instruction at trial. SH. at 603. Drag on argues that this claim falls under the "fundamental miscarriage of justice" exception to the procedural default rule because he is actually innocent of capital murder. See Sawyer v. Whitley, 505 U.s. 333 (1992).

In addition to finding a procedural bar, the state habeas court found that

> that application paragraph [of the jury charge] shows that the jury was precluded from convicting the applicant of capital murder unless that jury found that [Drag on] "specifically intended to cause the death' of the [victim] by shooting him with a gun. Thus, the application portion of the jury charge, which provided for a conviction for capital murder only upon a finding of specific intent to cause the death of the [victim] when [Drag on] shot the [victim], clearly and adequately focused the jury on the proper culpable mental state.

SH. at 603 ¶ 54 (case citations omitted). The jury was specifically instructed that Drag on could be convicted of capital murder only if

he "specifically intended to cause the death" of Armando Guerrero. The state habeas court's conclusion that this instruction cured any error in a prior portion of the jury instruction is not unreasonable and is entitled to deference under AEDPA. The record presents no basis to reject the state habeas court's conclusion.

G. The Claim of Prosecutorial Misconduct

Drag on again complains that the prosecutor impermissibly diminished the jury's responsibility in passing sentence by stating: "your job here is not to make a decision about whether or not the defendant receives the death sentence or serves life in prison but to follow the law and the evidence ...." Drag on raised this allegation of prosecutorial misconduct as a basis for one of his ineffective assistance of counsel claims. This court found the underlying claim meritless. This ground presents no basis for relief.

H. The *Penry* Claim

Drag on contends that the jury could not consider relevant mitigating evidence, including evidence of his drug and alcohol abuse, his upbringing, and his positive character traits, give mitigating weight to this evidence. Drag on asserts a violation of the rule set out in *Penry v. Lynaugh*, 492 U.S. 309 (1989) ("*Penry I*").

In *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), a plurality of the Supreme Court held "that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record ... as a basis for a sentence less than death." 438 U.S. at 604 (emphasis in original). This holding is based on the plurality's conclusion that death "is so profoundly different from all other penalties" as to render "an individualized decision ... essential in capital cases." *Id.* at 605. In *Penry v. Johnson*, 532 U.S. 782 U.S. 782 (2001) ("*Penry II* "), the Supreme Court clarified that a

capital sentencing jury must "be able to consider and *give effect* to a defendant's mitigating evidence in imposing sentence." *Id.* at 797 (Internal quotation marks, citation and brackets omitted). In Penry's trial, the jury was told to determine whether the evidence supported a finding on any of three statutory special issues. The jury was then told that it must consider mitigating evidence and, if it concluded that the weight of the mitigating evidence favored a life sentence, it should answer "no" to one of the special issues. *Id.* at 789-90. The Supreme Court found that there were two plausible interpretations of these instructions. First, the instructions could be understood as asking the jurors to weigh the mitigating evidence in

determining its answer to each special issue. *Id.* at 798. The Court held, however, that none of the special issues was broad enough for the jury to give mitigating effect to the evidence of Penry's retardation and the abuse he suffered as a child. *Id.* For example, the jury could fully credit the mitigating evidence, believe it required a sentence less than death, but find that Penry's retardation made him *more dangerous* in the future, compelling a positive answer to the future dangerousness special issue. The Court found that a second plausible interpretation was that the jury could simply give a negative answer to a special issue which it actually found was supported by the evidence. *Id.* The Court found that this interpretation made the jury instructions "internally contradictory, and placed law-abiding jurors in an impossible situation." *Id.* The Court concluded that the instructions injected an impermissible element of capriciousness into the sentencing decision. *Id.* at 800.

Penry II makes clear that jurors must have an opportunity to "fully consider [] the mitigating evidence as it [bears] on the broader question of [the defendant's] moral culpability." 532 U.S. at 787. The "State cannot bar 'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than

death.' " *Tennard v. Dretke*, ___ U.S. ___, 124 S.Ct. 2562, 2570 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). The Eighth Amendment requires that a capital sentencing jury be able to consider and give effect to *any* mitigating evidence that meets this threshold of relevance. *Tennard*, 124 S.Ct. at 2570.

Drag on contends that his voluntary intoxication had the effect of making him "virtually indistinguishable from an individual with the diagnosis of paranoid schizophrenia," citing the Lundberg-Love affidavit, which the jury could not sufficiently consider as mitigating evidence. Draughon's argument ignores the undisputed fact that his "paranoid schizophrenia" state of mind was the result of his voluntary intoxication. All intoxication defenses rest on the premise that intoxication made the defendant incapable of [the] mental state necessary to guilt. Draughon's assertion that his voluntary intoxication produced "paranoid schizophrenia" is simply a variation of this theme. Even if Lundberg-Love's analysis distinguished Draughon's argument from other voluntary intoxication cases, however, the Fifth Circuit has already rejected the claim that a defendant is entitled to a special mitigation instruction because his substance abuse caused him to exhibit symptoms of schizophrenia and that his behavior was attributable to a drug-induced psychosis. *See Robinson v. Johnson*, 151 F.3d 256, 163-66 (5th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995), the Fifth Circuit held that the Texas statutory special issues allowed the jury to consider, and give mitigating effect to, evidence of intoxication at the time of the offense. *Id.* at 489. The court reasoned that evidence of voluntary intoxication is relevant to deciding whether the defendant acted deliberately and to the future dangerousness issue.

The special issues allowed the jury to consider and give effect to evidence of Draughon's drug abuse (under the deliberateness and future dangerousness special issues) and

Evidence of his good and peaceable character (under the future dangerousness issue). It is less clear however, that the jury had a similar opportunity to consider the evidence of Draughon's dysfunctional up bringing. However, Draughon's mitigating evidence stands in marked contrast to the evidence at issue in *Penry*. Penry presented extensive evidence that he was mentally retarded and suffered severe abuse as a child. During his childhood, Penry was diagnosed with organic brain damage which was probably caused by trauma to the brain at birth. Results of intelligence tests showed his IQ as between 50 and 63, indicating mild to moderate retardation. An expert evaluation at the time of his first trial revealed that Penry, who was 22 years old at the time of his crime, "had the mental age of a 6 ½-year-old, which means that he has the ability to learn and the learning or the knowledge of the average 6 ½ year old kid. Penry's social maturity, or ability to function in the world, was that of a 9 or 10-year-old." *Penry* I, 492 U.S. at 308 (internal quotation marks omitted). In contrast, Drag on presented evidence showing that he suffered abuse as a child and grew up in dysfunctional settings, but there is no evidence that he suffered from any kind of organic mental impairment. Nor is there evidence of abuse that approached the level of the abuse at issue in *Penry*, in either nature or extent.

On Draughon's direct appeal, the Texas Court of Criminal Appeals held that "we do not think that [Drag on] might rationally be found less morally culpable for his adult behavior on this basis, according to contemporary moral values shared by a significant segment of our society." *Drag on v. State*, 831 S.W.2d 331, 340 (Tex.Crim.App. 1992). This conclusion is consistent with the Supreme Court's discussion in *Graham v. Collins*, 506 U.S. 461, 476-77 (1993), suggesting that such evidence is simply not within *Penry's* intended scope. Considering the stark differences in the mitigating evidence presented by Drag on and Penry, including the complete absence of any evidence that Drag on suffered from any

kind of mental impairment not caused by his own voluntary actions, the Court of Criminal Appeals decision is not unreasonable based on this record and under applicable law.

I. The Constitutionality of the Texas Death Penalty

Drag on next argues, relying on a dissenting opinion in *Callins v. Collins*, 510 U.S. 1141 (1994), that the death penalty, as it is administered in Texas, is unconstitutional. First, he argues that the Texas capital sentencing scheme fails to narrow the class of death-eligible defendants and guide the jury's discretion. Second, he argues, citing no authority, that the Eight Amendment "condemns drawn out sentences on death row...." Finally, Drag on argues that his sentence is disproportionate to other death sentences because he did not commit capital murder.

In many states, death-eligible defendants are distinguished from defendants who are not eligible for a death sentence through a finding of aggravating circumstances during the punishment phase of a trial. *See, e.g., Zant v. Stephens*, 462 U.S. 862, 875 (1983). In Texas, however, death-eligible defendants are distinguished from other defendants at the guilt/innocence phase. In order to make a defendant eligible for a death sentence in Texas, the jury must first find that defendant guilty of capital murder. All defendants convicted of capital murder are death-eligible. *See, e.g., Jurek v. Texas*, 428 U.S. 262, 268-72 (1976); *Woods v. Johnson*, 75 F.3d 1017, 1033 (5th Cir.) *cert. denied*, 519 U.S. 854 (1996). Narrowing the class of death-eligible defendants through the definition of capital offenses and the jury's finding of such an offence during the liability phase of trial, rather than through the jury's finding of aggravating circumstances during the penalty phase , is constitutional. *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988). Individualized sentencing consideration occurs during the sentencing phase when the jury decides whether a death-eligible

defendant should receive a death sentence, based on the answers to the special issues. *Jurek*, 428 U.S. at 271, 276. The Supreme Court has specifically approved the general structure of the Texas scheme. *Jurek*, 428 U.S at 276. The Texas death penalty scheme meets the constitutional requirement that it meaningfully narrow the class of death-eligible defendants.

Drag on cites no authority for his claim that the length of his stay on death row in and of itself constitutes cruel and unusual punishment that makes the sentence unconstitutional. This court has found no authority supporting the claim. The rule that Drag on advocates " was not dictated by precedent existing at the time [Draughon's] conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989). This court cannot grant relief on the basis Drag on asserts without announcing a new rule of criminal procedure, which would violate the nonretroactivity rule of *Teague*. *See Lackey v. Scott*, 52 F.3d 98 (5th Cir. 1994). This claim is with out merit.

Drag on argues that this death sentence violates the Eight Amendment because he did not commit capital murder, making his sentence disproportionate to sentences imposed on other defendants who did not commit capital murder. Setting aside the general unavailabilty of proportionality review, *see, e.g., Harmelin v. Michigan*, 501 U.S. 957 (1991), this clam fails because it rests on a logically flawed premise. Draughon's denial that he committed capitol murder is based on the flawed premise that he did not commit murder while in the course of committing a robbery. The undisputed evidence is that Drag on did shoot Guerrero during the course of committing a robbery, during Draughon's immediate flight from the robbery. The trial evidence was sufficient to support the jury's findings on the intent and deliberateness. While Drag on is entitled to relief on the ground of ineffective assistance of counsel, and evidence not presented by his original trial counsel might undercut the jury's findings on intent and deliberateness, the

proportionality argument relates only to the crime for which Drag on was actually convicted and the evidence on which that conviction is based. The sentence Drag on received was not disproportionate, either to the crime itself or to other sentences meted out to those convicted of capital murder.

IV. Certificate of Appealability

Drag on has not requested a certificate of appealability ("COA"), but this court may determine whether he is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. See *Whitehead v. Johnson*, 157 F3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA request before the court of appeals does.") " A plain reading of the AEDPA compels the conclusion that COAs are g ranted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*,

213 F.3d 243, 248 (5th Cir.), *cert. denied,* 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253© is straightforward:
>
> The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicate where...
>
> The district court dismisses the petition based on procedural grounds.
>
> We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. mcDaniel, 529 U.S. 473, 484 (2000). "[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson,* 221 F.3d 741, 772 (5th Cir. 2000), *cert. Dismissed,* 531 U.S. 1134 (2001).

This court has carefully and exhaustively considered each of Draughon's claims. While the issues Drag on raises are clearly important and deserving of the closest scrutiny, this court finds that each of the claims except for his ineffective assistance of counsel claims relating to the lack of ballistics evidence is foreclosed by

clear, binding precedent. This court concludes that under such precedents, Drag on has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). As to those claims that have been dismissed on procedural grounds, this court concludes that jurists of reason would not find it debatable whether the petition states valid grounds for relief and would not find it debatable whether this court is correct in its procedural determinations. This court concludes that Drag on is not entitled to a certificate of appealability on his claims.

V. Conclusion and Order

For the forgoing reasons, it is ORDERED as follows:

1. Respondent Doug Dretke's Motion for Summary Judgment (Document No. 8)

   is GRANTED IN PART. Draughon's claims except those pertaining to trial Counsel's failure to present expert ballistics evidence are dismissed.

2. Dretke's motion for summary judgment is DENIED as to those portions of

   Draughon's claims pertaining to trial counsel's failure to present expert ballistics evidence.

3. Draughon's Petition for Writ of Habeas Corpus is GRANTED IN PART as to

   Those portions of his claims pertaining to trial counsel's

failure to present expert ballistics evidence.

4. A writ of habeas corpus will issue directing respondent Dretke to release

Drag on from custody unless, within 120 days of the entry of final judgment in this case, the State of Texas either: a) grants Drag on a new trial; or b) vacates Draughon's capital murder conviction, enters a conviction for the crime of felony murder under Tex. Penal Code § 19.02(b)(3), and grants Drag on a new sentencing hearing consistent with applicable Texas law.

5. A Certificate of Appealability will not issue.

6. Final judgment will be entered by separate order.

SIGNED at Houston, Texas, on this 17th day of September, 2004.

LEE H. ROSENTHAL
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARTIN A. DRAG ON,	§	
Petitioner,	§	
	§	
	§	H-02-1679
DOUG DRETKE, Director	§	
Texas Department of Criminal	§	
Justice - Correctional Institutions Division,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

For the reasons set forth in this court's Memorandum and Order Granting In Part and Denying In Part Respondent Doug Dretke's Motion for Summary Judgment, (Docket Entry 8), and Granting In Part and Denying In Part Petitioner Martin A. Draughon's Petition for Writ of Habeas Corpus, (Docket Entry 1), judgment is entered for the petitioner as to those portions of his claim concerning counsel' s failure to present expert ballistics evidence. Respondent will release Drag on from custody unless, within 120 days from the date this judgment is entered the State of Texas either: a) grants Drag on a new trial; or b) vacates Draughon's capital murder conviction, enters a conviction for the crime of felony murder under Tex. Penal Code § 19.02(b)(3), and grants Drag on a new sentencing hearing consistent with applicable Texas law.

Judgment is entered for respondent on all petitioner's claims except those based on trial counsel's failure to present expert

ballistics evidence; these claims are dismissed with prejudice.

With the exception of those claims on which relief is granted, petition Drag on has not made a substantial showing of the denial of a constitutional right. A certificate of appealability should not issue.

SIGNED on September 17, 2004, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Martin Allen DRAG ON, Petitioner-Appellee-Cross-Appellant,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional
Institutions Division, Respondent-Appellant-Cross-Appellee.

No. 04-70043.
Sept. 30, 2005.

Jeffrey J. Keyes (argued), James J. Long, Briggs & Morgan, Minneapolis, MN, for Drag on.
Tina J. Dettmer (argued), Austin, TX, for Dretke.
Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, HIGGINBOTHAM and SMITH, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

A jury in Harris County, Texas, convicted Martin Allen Drag on of murdering Armando Guerrero during a robbery and sentenced him to death. The Texas Court of Criminal Appeals affirmed the conviction and sentence.[21] The state trial court filed findings of fact and conclusions of law denying habeas relief which were in turn adopted by the Court of Criminal Appeals in an unpublished order

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[21] *Drag on v. State*, 831 S.W.2d 331 (Tex.Crim.App.1992), *cert denied*, 509 U.S. 926, 113 S.Ct. 3045, 125 L.Ed.2d 730 (1993).

in 2001.[22] Drag on filed his federal petition in 2002, and the federal district court entered the judgment now before us on September 20, 2004.[23]

In its opinion, the district court held that Draughon's counsel provided ineffective assistance at both the guilt and sentencing phases of his trial, and that the state court's contrary decision was an unreasonable application of settled federal law. It ordered the State of Texas to either release him or try him again. Draughon's convictions stemmed from his robbery of a restaurant. As he fled the scene of the crime, he shot and killed a pursuing bystander. He denied any intent to harm, insisting that he had been attempting to fire over the heads of his pursuers. The State offered testimony that the fatal shot that struck Guerrero in the chest was fired at close range, approximately ten steps away. The court found that defense counsel failed Drag on in not obtaining expert forensic examination of the path of the fatal shot; that such an effort could have provided the jury with evidence that the fatal bullet had bounced off the pavement in front of the victim and was fired some distance away.

The State filed a timely notice of appeal. In turn, Drag on seeks a certificate of appealability on a Penry claim should this court reverse.

I.

On November 22, 1986, Drag on attempted to rob a Long John Silver's restaurant in Houston, Texas. Hubbard Eugene Taylor, the

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[22] *Drag on v. Dretke*, No. H-02-1679 (S.D.Tex. Sept. 20, 2004) (unpublished order).

[23] *Ex parte Drag on*, No. 27,511-02 (Tex.Crim.App. May 9, 2001) (unpublished).

assistant manager, closed the restaurant at approximately 11:00 p.m. As he finished closing up, Taylor saw two relatives of his cashier gesturing to him through the window. Taylor and two employees went outside. A man wearing a stocking mask pointed a gun at them and said, "This is a stick up. Get back inside." The four complied. The robber told Taylor to "[g]et that alarm in the back. I know it's in the back." Taylor went to open the safe. The safe had a delay mechanism that required Taylor to wait ten minutes after entering the combination for a green light to come on, signifying that the safe could be opened. While Taylor waited, the robber approached him and asked, "[w]here is that green light?" While still waiting for the green light, Taylor heard some noise coming from the front of the restaurant. He later learned that the noise was caused by several people banging on the doors and windows. The robber then went to the back of the restaurant. Taylor heard the alarm go off and saw the robber leaving through the back door. Restaurant employee Susan Cuellar later identified Drag on as the robber.

Ricardo Guerrero lived near the restaurant. As he drove up to his apartment shortly before midnight on November 22, 1986, he saw Eva Cuellar running, crying and screaming for help. Guerrero followed Ms. Cuellar to the back of the restaurant. Attracted by her pleas for help, others also followed. Guerrero saw the back door of the restaurant open and a man run through it. The man ran into the parking lot and turned around. Guerrero heard a shot, threw himself to the ground, and heard several more shots. He also heard a truck. When Guerrero looked up, he saw the man jumping into the bed of a moving truck. Guerrero testified at trial that the man fired no additional shots after jumping onto the truck. After the truck left, Guerrero stood up and saw his cousin, Armando Guerrero, lying on the ground with a bullet wound in his chest. Several of the men in the parking lot drove Armando to an emergency room, where he died.

Eva Cuellar, the mother of the restaurant cashier, was the key

witness. She was standing near Armando when he was shot. She testified that she lived across the street from the Long John Silver's where her daughter Susan worked. With the late hour she became apprehensive about her daughter as the restaurant was preparing to close. Accompanied by her young son Eddie and armed with a knife, she walked to the restaurant and peered into the window. All appeared well at the time and she started back to the family home, leaving Eddie at the restaurant to accompany his sister home at closing. Not satisfied, she returned and this time saw that a man had drawn a stocking over his face and was holding a gun on the workers, including her daughter, Susan, and her son, Eddie. It was then that she fled down the street securing the help of some men who were having a beer in front of their homes. They returned to the restaurant and Armando suggested he and Ms. Cuellar go to the rear of the building and catch the robber if he fled out the back door. As they arrived at the rear Drag on suddenly burst through the door in a run. Ms. Cuellar testified that Drag on took about ten running steps after leaving the restaurant, and began shooting. She saw the "fire" from the pistol and Armando fall, holding his chest. According to her testimony, Drag on fired three to six times before jumping into the back of a waiting truck which was pulling away. The pursuers were not armed except for the knife Ms. Cuellar had earlier procured. Thinking that Drag on had harmed her children, she chased the fleeing Drag on, throwing her knife at him in frustration and without effect.

Norene Smith, a nurse working in the emergency room when Armando was brought in, described the medical staff's unsuccessful efforts to resuscitate him. Smith explained that the bullet struck Guerrero's heart, leaving a great deal of blood in the chest cavity. Dr. Aurelio Espinola, a forensic pathologist, testified that the gunshot wound caused the death.

Following his arrest, Drag on was tried for capital murder.

The parties agree that the following summary of evidence found by the federal district court is accurate:

> Drag on testified on his own behalf during the punishment phase of trial .... Drag on explained the events that led to the shooting. Kenneth Gafford had formerly worked for the Long John Silver's and knew how the restaurant was set up and how the safe and alarm system worked. His information led to the planned robbery. Drag on testified that he saw a crowd forming outside the restaurant during the attempted robbery, became nervous, and ran out the back door toward the pickup truck where Gafford was waiting to drive away. The pickup was parked near the back of the restaurant. As Drag on neared the truck, he turned and saw several people chasing him. Drag on testified that he dove into the back of the truck bed, leaned over the railing, and fired four shots. He testified that he aimed over the heads of the crowd and was only trying to scare people so they would stop chasing him. Drag on did not know that he shot Guerrero. Drag on offered no expert ballistics testimony in his defense. Charles Anderson, Firearms Examiner for the Houston Police Department, testified that nothing on the bullet recovered from Guerrero's body showed that it had hit an object and ricocheted before striking Guerrero.[24]

The district court also summarized the testimony offered by Drag on during the evidentiary hearing in support of his claim that counsel was ineffective for failing to present ballistics evidence during trial:

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[24] *Drag on*, No. H-02-1679, at 6-7 (internal citation omitted).

Lucian Haag, a certified criminalist, testified at the evidentiary hearing in this court.[25] Haag has particular training and expertise in firearms evidence and has published several papers on firearms evidence. Haag testified that Draughon's counsel asked him to try to determine whether the fatal bullet could have hit a surface or object and ricocheted before striking Guerrero; to assess the distance from which the bullet was fired; to evaluate the quality of police investigation into Guerrero's death; and to opine on the work a ballistics expert could have done at the time of Draughon's trial. Haag testified that there were criminalists doing such work at the time of Draughon's trial.

Haag tested a Raven .25 pistol with a magazine and a single live round of ammunition and examined a fired bullet. Haag examined the rifling characteristics against those on the fired bullet, which was retrieved from Armando Guerrero's body. Haag noted damage to the fired bullet in the ogive area--the narrower part of the bullet that does not come into contact with the gun barrel. He observed heavy striations over the length of the bullet. Haag testified that the damage was caused by the bullet impacting a flat, unyielding, abrasive surface. Haag concluded that this damage occurred after the rifling marks were made, meaning that the striations occurred after the gun discharged the bullet. Haag concluded that this damage was a

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[25] A criminalist is similar to a forensic examiner, but has broader training and experience. Haag explained, for example, that a forensic examiner might work in only one unit of a crime lab, whereas a criminalist will usually have worked in all sections of the crime lab.

consequence of the bullet ricocheting off a hard, flat, unyielding surface, such as concrete or asphalt. Haag also concluded that the bullet had struck this hard, flat surface at a low angle, estimating it to be five degrees or less, and deflected or ricocheted off this surface before striking Guerrero. Haag opined that this damage would be obvious to any competent firearms examiner.

Haag also examined the bullet under a scanning electron microscope ("SEM"). He explained that the SEM gives an examiner greater depth of field and a better view of any particles transferred to the bullet from a ricochet surface. Haag found many grains of mineral materials embedded in the bullet. Specifically, he found grains of quartz and silicon dioxide, which he identified as sand. He also found grains containing silicon, aluminum, and calcium. Sand is found in concrete, and silicon, aluminum, and calcium are found in stones, asphalt, or concrete. Haag testified that the presence of the particles support the conclusion that the bullet hit and ricocheted off an abrasive surface before striking Guerrero.

Haag also studied the report of the autopsy performed on Armando Guerrero and testified that autopsy findings were consistent with the findings of ricochet damage to the bullet. The autopsy report stated that the bullet entered Guerrero's body pointing up and to the side. The bullet traveled between two ribs, grazed the heart and stopped inside the chest cavity, penetrating only a few inches into Guerrero's body. Haag testified that a bullet entering soft tissue will ordinarily penetrate ten to twelve inches. If the

bullet has ricocheted, however, it will "tumble" rather than going [sic] straight, and will not penetrate as deeply as it would with a direct shot. A "tumbling" bullet will also cause an asymmetric abrasion rim on the entrance wound, which was found on Guerrero's body. Haag ran tests on ordnance gelatin and other tissue stimulant to confirm these conclusions.

Haag also calculated the approximate distance between Drag on and Guerrero when Drag on fired the gun. Haag estimated that the bullet struck an object or surface[26] at approximately a five degree angle and ricocheted. Haag based the estimate on the condition of, and markings on, the bullet. When a bullet strikes the ground at a five-degree angle, it ricochets from the ground at an angle of one to two degrees. The autopsy report stated that the bullet struck Guerrero at a point on his body approximately forty-seven inches above the ground. Based on these figures, Haag calculated the distance the bullet traveled before striking the ground or object from which it ricocheted and the distance the bullet traveled after striking the ricochet surface but before hitting Guerrero. Haag estimated that Drag on stood from thirty to one hundred yards from Guerrero when he fired the gun. Haag could not be more precise about the distance from which Guerrero was shot because the evidence conflicted as to whether Drag on was on the ground or on the truck bed when he fired the gun. In addition, Haag had no information as to whether Guerrero was standing

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[26] Based on his review of the crime scene, Haag concluded that the ricochet surface was most likely the ground, but he did not definitely rule out the possibility that the bullet ricocheted off another surface, such as a wall.

straight up or stooping when he was shot. As a result, Haag could only provide estimates of the impact and departure angles of the bullet.[27]

II.

Our question is whether the adjudication of the claim by the State court " '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.' "[28]

The Supreme Court has explained that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite

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[27] *Drag on*, No. H-02-1679, at 19-22 (internal citations omitted) (emphasis in original). The district court misreads Haag's testimony regarding the distance the bullet traveled before striking the victim. While admitting that certain factors may affect the distance the bullet traveled, Haag gave conservative estimates based on the likely position of Drag on and the victim when the shooting occurred. He testified that the distance from Drag on to the point of ricochet ranged from fifteen to twenty yards, while the distance from the point of ricochet to the victim could range from thirty to thirty-seven yards.

[28] *Riddle v. Cockrell*, 288 F.3d 713, 716 (5th Cir.) (quoting 28 U.S.C. § 2254(d)(1)-(2)), *cert. denied*, 537 U.S. 953, 123 S.Ct. 420, 154 L.Ed.2d 300 (2002).

result.[29] Alternatively, a state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case.[30]

A federal habeas court's inquiry into unreasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly.[31] Rather, federal habeas relief is only merited where the state court decision is both "incorrect and objectively unreasonable."[32] Finally, in "evaluating the district court's resolution of the merits of issues presented to it, we review the district court's findings of fact for clear error and its conclusions of law de novo."[33]

The state court rejection of Draughon's claim that his counsel was ineffective in failing to obtain forensic examination of the path of the fatal bullet is measured by the two-prong test of Strickland v. Washington[34]– the objective reasonableness of the decision to not

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29 *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *see Hernandez v. Johnson*, 248 F.3d 344, 346 (5th Cir.2001).

30 *(Terry) Williams*, 529 U.S. at 407-09, 120 S.Ct. 1495; *Hernandez*, 248 F.3d at 346.

31 *(Terry) Williams*, 529 U.S. at 409-11, 120 S.Ct. 1495; *Tucker v. Johnson*, 242 F.3d 617, 620 (5th Cir.2001).

32 *Morrow v. Dretke*, 367 F.3d 309, 313 (5th Cir.2004).

33 *Nixon v. Epps*, 405 F.3d 318, 322 (5th Cir.2005).

34 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

pursue forensic examination and its prejudicial effect.[35] The first inquiry asks whether counsel's performance "fell below an objective standard of reasonableness" as measured by "prevailing professional norms."[36] The second inquiry asks whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[37] We conduct these inquiries against the overarching principle of a strong presumption that an alleged deficiency "falls within the wide range of reasonable professional assistance,"[38] and ultimately through the prism of AEDPA. In our analysis we do not attempt to place the events of trial into two separate airtight containers of the first and second prongs of Strickland. The facts that demonstrate a reasonable probability of a different outcome but for counsel's decisions can cast light on their reasonableness.

III.

Drag on attempted to develop his ineffective assistance claim before the state habeas court, but was denied access to the ballistics evidence despite affidavits from the chief and deputy medical examiners of Bexar County expressing their view that forensic examination was necessary because the limited evidence that was available raised the possibility of a ricochet. The state habeas court did not hold an evidentiary hearing and adopted the State's proposed findings of fact and conclusions of law, including a ruling that "[c]ounsel cannot be held ineffective based on possibly differing

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35 *Id.* at 687, 104 S.Ct. 2052.

36 *Id.* at 688, 104 S.Ct. 2052.

37 *Id.* at 694, 104 S.Ct. 2052.

38 *Id.* at 689, 104 S.Ct. 2052.

expert opinions concerning the trajectory of the bullet."[39] The Texas Court of Criminal Appeals by per curiam order denied relief based "upon the trial court's findings and conclusions and our own review."[40]

The federal district court conducted a full evidentiary hearing and entered her findings in a comprehensive memorandum opinion.[41] The crux of her holding was that the evidence offered by Haag should have been presented in the state trial. The court found that had this evidence been adduced at trial, it would have directly confronted the state's core theory that Drag on turned and shot Armando in the chest from a distance of about ten running steps, a deliberate act that defies Draughon's claim that he did not intend to kill and was firing over the heads of his pursuers. The federal district court ultimately concluded that the state habeas court's rejection of the Strickland claim was an unreasonable application of federal law.

A.

We turn first to the performance prong of the Strickland test. There is little question that Haag presented a strong case that the fatal bullet struck the pavement in front of the victim and was fired at a much greater distance than the ten or so running steps estimated

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[39] *Ex parte Drag on*, No. 463658-A, at 28 (338th Dist. Ct., Harris County, Tex. Jun. 28, 2000) (unpublished) (findings of fact and conclusions of law).

[40] *Ex parte Drag on*, No. 27,511-02.

[41] Since Drag on did not "fail" to develop the factual basis of his claim in state court the federal hearing was not barred by 28 U.S.C. 2254(e)(2).

by Eva Cuellar. The importance of this testimony cannot be overstated. Competent counsel would have been keenly aware of its importance and what would follow without it, the prejudice to Drag on. Predictably, the skilled prosecutor made the distance between the shooter and the victim the central theme of her argument at Draughon's trial that he intended to kill, and that he should receive the death penalty. For example, she argued:

> but that first shot, that first shot was intentional and it was so quick that all Armando had time to do was to duck slightly. It happened so quick the man couldn't defend himself. He was just standing there. The man shot him like, just like men shoot a bird or animal .... And indeed didn't it turn out to be a perfect shot? A shot right through the heart.

This suggestion that the distance between victim and shooter was small rests largely on the testimony of Eva Cuellar. Her admirable traits of hard work, devotion to her children and simple sincerity made her a compelling witness. It was here that the absence of a counter-theory of greater distance supported by forensic evidence took its toll as it left her testimony largely unchallenged, relinquishing openings for questioning the accuracy of her testimony. And there were obvious opportunities lost. First, she was not a detached passerby but a participant in the fast unfolding events. Moreover, she was an extremely agitated observer. When Drag on burst suddenly through the back door, Ms. Cuellar was under the impression that he had harmed her two children. Her focus was on apprehending Drag on or exacting some revenge. She was the only witness who did not duck. Rather, she was so angry that, disregarding risk to herself, she chased after him and, in frustration, flung a knife in the direction of his fleeing figure.

There was yet another significant lost opportunity. Ms.

Cuellar had been in the United States for twenty-five years. She had no formal education and could not read or write in English or Spanish. Her lack of formal education made communication with counsel difficult, as a reading of the transcript makes plain. The trial testimony supporting the "ten running steps"-theory bears direct quotation:

> Q: Now, when the man came running out and he shot, how many steps or how far did he go before he shot?
> A: I don't know, some eight feet, nine feet; I don't know.
> Q: Past Armando, I'm sorry, past the man you were standing by?
> A: Yes.
> Q: Are we talking about eight or nine feet rulers or are we talking about eight or nine running steps?
> A: Well, as I no (sic) nothing about that I believe it's about or nine steps or a little more. I don't know.
> Q: About ten steps maybe?
> A: Yes.
> Q: Just approximately?
> A: Perhaps.
> Q: And then after he went about nine steps or so, running steps, then what did the robber do?
> A: He turned and shot.

When defense counsel asked Ms. Cuellar to point out locations on a diagram, the prosecutor asked to take the witness on voir dire and, out of the presence of the jury, properly disclosed to the court:

> I think that Eva is very honest about what she does and doesn't understand and I certainly don't want to embarrass her, but, I don't think she feels embarrassed

> but I tried to show her a diagram, Your honor, and she simply told me over and over she just couldn't understand it but she can explain from the pictures, but she can't understand the diagram.

When defense counsel showed Ms. Cuellar a diagram she replied, "I don't understand that thing at all, not at all. You can tell me a thousand times about that thing. I just don't understand." Counsel then moved to photographs which she was able understand.

The absence of the evidence outlined by Haag left Drag on as the sole source of evidence available to contradict the accuracy of Ms. Cuellar's testimony. Reasonable counsel would have known the high price Drag on would pay for taking the stand to tell his version of the shooting. And he did not testify until the punishment phase, leaving his contention that he was innocent of capital murder without footing. Then, when he did take the stand, the prosecutor ridiculed as ludicrous Draughon's testimony that he fired from the back of the truck, telling the jury: "We know that all the scientific evidence agrees with the things [Guerrero and Eva Cuellar] have been telling us .... There is absolutely no physical evidence to support his version of the facts. I would submit to you that you are going to have to answer number 1 yes because deep down all twelve of you believe Eva and believe Ricardo ...." Moreover, the prosecution had a murder victim who had placed himself in harm's way in an effort to assist Ms. Cuellar and the victims of the robbery in progress.

The State answers that counsel made a strategic decision not to seek forensic evidence regarding the ricochet. Relatedly, the State urges that such evidence would have undermined the defensive theory that Drag on was attempting to fire over the heads of the pursuers. Pointing to Draughon's testimony that he did not fire until after he had jumped into the back of the getaway truck, and was

being jostled by the truck as he fired four shots in an effort to slow the pursuit, the State counters that if Drag on were in the truck he would have had no reason to fire any shots given that he had effectively made his escape. Moreover, the State observes that the jury could have concluded that Drag on intended to kill from his firing four to six times in disregard fc life after the threat of pursuit had ended.

Although Draughon's state trial counsel filed a total of three affidavits, they did not assert that they made a "strategic decision" not to develop forensics. They offered little more than conclusory assertions beyond reciting that they had visited the murder scene and searched for shell casings and bullet strikes. Contrary to the State's contention that the ricochet theory came later, defense counsel were well aware that the trajectory of the bullet could be critical, and examined members of the venire about it. Specifically, they posed hypotheticals to explain to the venire that if a warning shot fired into the rafters ricochets and kills, "under the law, that is not capital murder." The state concedes, as it must, that counsels' investigation did not include forensic assistance or other examination of the ballistics or trajectory of the fatal shot. Rather, it urges that counsel reached a strategic decision not to "retain an expert to investigate and offer an opinion regarding the distance and direction from which Drag on fired the fatal shot."

The difficulty with these contentions is that they do not confront the reality that the failure to investigate the forensics of the fatal bullet deprived Drag on of a substantial argument, and set up an unchallenged factual predicate for the State's main argument that Drag on intended to kill. It left little with which to persuade the jury that Ms. Cuellar's statement of distance was faulty. As we have observed, Drag on became the sole source of evidence available to counter the prosecution's theory. In these observations we look at what might have been, not to judge the performance of trial counsel

by failures of strategic decisions reasonable when made, but to meaningfully examine whether counsels' failure to investigate was based on a "reasonable decision" that made such an investigation "unnecessary."[42]

To those familiar with the evidence in the case, the centrality of distance from shooter to victim is plain. The prosecutor in the case expressed concern that the State was not preparing to challenged the testimony of Haag. She expressed the view that such a challenge was essential because evidence of a ricochet "would have been very important evidence;" that if such evidence were true, failure to present the evidence could have constituted ineffective assistance. Her views were prescient. On this record we have no hesitation in concluding that the state court unreasonably applied settled federal law, the first element of Strickland. In this conclusion we have traveled much of the distance toward a conclusion that Strickland's second prong was also unreasonable rejected. We repair to many of the same facts with our focus upon the factually interrelated question of prejudice.

B.

Answering the question of prejudice as measured by Strickland and filtered through our narrowing-prism of the reasonableness of its application by the state court warrants additional examination of events at trial. On doing so, we agree with the judgment of the federal district court that the state court rejection of Draughon's habeas petition cannot be reasonably defended on the basis that there was no reasonable probability of a

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[42] *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

different result had counsel obtained the forensic testimony.

The prosecution offered the jury a portrait of a ruthless and cruel individual engaged in a reckless spree of robbing Long John Silver's restaurants. The prosecution offered the jury evidence that the police caught Drag on as he fled a robbery of another Long John Silver's restaurant, much like the robbery resulting in the death of Armando Guerrero. In both cases, Drag on brandished a gun as he fled. In the second robbery, the arresting officer stopped Drag on only by shooting at him, thinking Drag on was about to fire at him over his shoulder as he ran from the restaurant. The police bullet missed Drag on, but caused him to surrender.

It bears emphasis that the absence of forensic evidence facilitated the State's deft portrait of a violent young man. Without the forensic testimony, only Drag on could counter the State's short-distance-to-victim thesis. When he took the stand in the punishment phase, he paid dearly for it. The prosecutor on cross-examination marched him through the details of his rape of one of his robbery victims, a restaurant worker, details the prosecutor in deference to the victim had not elicited from her in her earlier testimony. The prosecutor forced Drag on to relate how he took a knife and cut the skirt and underclothing from the rape victim in a sadistic manner, had sex with her, and violated her with a broom handle. Pressed on cross-examination to explain the "why" of his conduct, Drag on had no explanation, implying at one point that the sex was consensual.

This was important evidence, but it does not counter Draughon's claim of a reasonable probability of a different outcome had he had at trial the forensic evidence developed in federal habeas. While this evidence of Draughon's serial robberies, the rape, and his arrest supported the State's argument for a "yes" answer to the question of future dangerousness in the punishment phase, it

does not soften the impact of counsel's failure on the determination of guilt.

The State urges that the federal district court went awry in its application of Strickland by failing to examine the case within the frame of trial preparation and execution. The State is on solid ground in pointing to risks inherent in the retrospective examination of what should have been done aided by knowledge of how it all played out. This risk, coupled with the deference to the adjudication by the State courts required by Congress and general principles of comity and federalism, demands that federal courts be sensitive to unwittingly harsh judgments of choices made by lawyers in the heat of trial--choices that were not so clear at the time as they often become with hindsight. This said, we are persuaded that the district court's judgment granting relief must be affirmed for essentially those reasons stated by that court.

IV.

The State does not oppose the grant of a certificate of appealability on Draughon's claim that the jury could not give effect to his evidence of abuse as a child and "dysfunctional upbringing" in violation of Penry v. Lynaugh.[43] We grant the certificate but conclude that under controlling precedent it is lacking in merit. The jury could have given it effect under the future dangerousness special issue. It was admitted at trial and subjected to no screens such as "constitutional relevance."

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[43] 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); *see Smith v. Texas*, 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004); *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

V.

For the foregoing reasons, the judgment of the district court granting relief is AFFIRMED.

No. 05-875

IN THE

Supreme Court of the United States

MARTIN ALLEN DRAUGHON,

Respondent,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONAL DIVISION,

Petitioner.

On Petition For Writ of Certiorari to the Fifth Circuit Court of Appeals

BRIEF FOR THE RESPONDENT IN OPPOSITION

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REASONS WHY THE PETITION SHOULD BE DENIED

The unanimous panel of the Fifth Circuit (Jolly, Higginbotham, and Smith, Circuit Judges) and the district court (Rosenthal, J.) each carefully applied, pursuant to AEDPA guidelines, the settled principles of *Strickland v. Washington*, 466 U.S. 688 (1984) and its progeny in holding that in the fact-specific context of this case there was constitutionally ineffective assistance of counsel. This case presents no circuit split, no unsettled issue of law, or any broad-sweeping issue of national importance to warrant review by this Court. It breaks no new ground and follows the post-*Strickland* jurisprudence of this Court, including *(Terry) Williams v. Taylor,* 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 125 S.Ct. 2456 (2005).

The State's sole argument for certiorari is that the lower court misapplied *Strickland* by allegedly engaging in "hindsight analysis" in determining whether there was ineffective assistance of counsel. However, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. The State's argument for certiorari is no more than a plea for this Court to engage in further appellate review of the way in which the district court – and the unanimous Fifth Circuit panel – applied settled law to the facts of this case. Even if the courts below had misapplied *Strickland*, which they did not, the State presents no issue to this Court which is certworthy.

In commenting about the review which a court should make of counsel's performance to determine whether it was deficient, this Court in *Strickland* had observed that: "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. This was simply a caution that the reviewing court should be cognizant of the fact that any such review of counsel's performance will by its nature be retrospective because it will be after the fact and care should be taken to show deference to counsel's judgment and circumstances. The sole issue presented by the petition for certiorari, "[w]hether the lower court engaged in hindsight analysis in direct conflict with the directive in *Strickland* ...," Cert. Pet. at i, requires a fact intensive inquiry about how *Strickland's* note of caution was applied in the context of this case and thus presents no appropriate question for review by the Court.

As a review of their opinions shows, however, the courts below did in fact properly apply *Strickland* to the facts of this case. Both courts examined the ineffective assistance of counsel claim through the lens of the admonition in *Strickland* that the court's review of counsel's performance should be deferential and sensitive to the retrospective nature of the review. The Fifth Circuit showed precisely this concern when it stated:

> The State urges that the federal district court went awry in its application of *Strickland* by failing to examine the case within the frame of trial preparation and execution. The State is on solid ground in pointing to risks inherent in the retrospective examination of what should have been done aided by knowledge of how it all played out. This risk, coupled with the deference to the adjudication by the State courts required by Congress and general principles of comity and federalism, demands that federal courts be sensitive to unwittingly harsh judgments of choices made by lawyers

> in the heat of trial – choices that were not so clear at the time as they often become with hindsight. *This said, we are persuaded that the district court's judgment granting relief must be affirmed for essentially those reasons stated by that court.*

Pet. App. C at 19 (emphasis supplied). The district court also showed this concern: "Reasonableness is measured against prevailing professional norms and must be viewed under the totality of the circumstances. [*Strickland*, 466 U.S.] at 688. A court's review of counsel performance is deferential. *Id.* at 689." Pet. App. A at 15-16.

With this deferential view in mind, both courts examined the claim of ineffective assistance of counsel by an objective standard of "reasonableness under prevailing professional norms," reconstructed the circumstances of counsel's challenged conduct, and evaluated the conduct from counsel's perspective at the time of trial. Pet. App. A at 15-16; Pet. App. C at 9-11. They examined the obligations which trial counsel had at the time the case was tried and the resulting prejudice to Draughon of the deficient performance of those obligations. Pet. App. A at 24-30; Pet. App. C at 15-19. They determined that the evidence of the ricochet bullet and the substantial distance between shooter and victim was critical to Draughon's case, was available at the time, and should have been developed to adequately defend Draughon. Pet. App. A at 24-30; Pet. App. C at 15-19.

The State argues in its Petition, as it did below, that "[c]ounsel's decision to forego the assistance of a ballistics expert during trial was a sound, tactical decision made in light of the circumstances present at the time." Cert. Pet. at 13. However, the unanimous panel of the Fifth Circuit and the district court each pointed out that there was no evidence that trial counsel made any decision, much less a strategic

one, to refrain from an expert ballistics investigation or the presentation of the critical evidence about the ricochet of the bullet and the distance between the shooter and the decedent. Pet. App. C at 16 ("Although Draughon's state trial counsel filed a total of three affidavits, they did not assert that they made a 'strategic decision' not to develop forensics. ... The state concedes, as it must, that counsels' investigation did not include forensic assistance or other examination of the ballistics or trajectory of the fatal shot."); Pet. App. A at 25-27. The limited amount of investigation that they conducted, such as traveling to the scene of the crime, obtaining photographs and measurements, studying the exterior of the building for evidence of bullet strikes, and reviewing the prosecutor's file and the evidence against Draughon, should have led to a ballistics examination of the evidence and to the submission on behalf of Draughon, as the Fifth Circuit said, of the "strong case that the fatal bullet struck the pavement in front of the victim and was fired at a much greater distance than the ten or so running steps estimated by [a witness]." Pet. App. C at 12-13.

Indeed, as the Fifth Circuit pointed out, counsel were well aware at the time of trial that the trajectory of the bullet could be critical as shown by the fact that during the venire they asked prospective jurors about it, posing hypotheticals to explain that if a warning shot fired into the rafters ricochets and kills "'under the law, that is not capital murder.'" Pet. App. C at 16. As the district court found:

> "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to strategy." *Wiggins v. Smith*, 539 U.S. 510, __, 123 S. Ct. 2527, 2538 (2003) Rather, as *Wiggins* makes clear, the decision not to investigate further is reasonable only to the extent that counsel's investigation leads to the conclusion that further

> investigation would be futile. In this case, there is no evidence that counsel obtained any expert advice on whether ballistics analysis of the fatal bullet would have been helpful. The bullet was clearly the best--indeed the only--piece of physical evidence available to Draughon. Counsel was deficient in not seeking such expert assistance.

Pet. App. A at 27.

The State speculates that Draughon's counsel failed to conduct a ballistics investigation and thus failed to present the evidence of a low angle ricochet bullet fired at a substantial distance of approximately fifty yards away because if counsel had procured this evidence they would not have used it because it could have contradicted Draughon's testimony in the punishment phase that he was firing wildly above the heads of the crowd to scare them away. As the Fifth Circuit said, "[t]he difficulty with these contentions is that they do not confront the reality that the failure to investigate the forensics of the fatal bullet deprived Draughon of a substantial argument, and set up an unchallenged factual predicate for the State's main argument that Draughon intended to kill." Pet. App. C at 16. Moreover, as the State concedes, counsel in this case simply failed to investigate the ballistics and, as this Court noted in *Wiggins*, when there is a failure to thoroughly investigate and obtain evidence, the focus should not be on whether the counsel should have presented the undiscovered evidence at trial, but rather on whether "the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable." *Wiggins*, 539 U.S. at 523 (citing *Strickland,* 466 U.S. at 691). Since they did not have the ballistics evidence, counsel were in no position to make a decision as to whether such information would have been

helpful to Draughon's defense and their performance was deficient. Pet. App. A at 26.

The failure of Draughon's trial counsel to develop and present the ballistics evidence left Draughon without the most important evidence to rebut the State's claim that Draughon must have intended to kill the victim of the shooting because he supposedly shot the victim at dead aim directly through the heart and at a distance of only ten steps away. At the trial, the State's police examiner testified that he had examined the fatal bullet and there was no evidence that the bullet ricocheted, and this went unrebutted at trial even though the testimony of expert Haag in federal habeas rebutted and discredited this claim. As the Fifth Circuit pointed out, the "skilled prosecutor made the distance between the shooter and the victim the central theme of her argument at Draughon's trial that he intended to kill, and that he should receive the death penalty. In final argument, the prosecutor said: ... 'The man shot him like, just like men shoot a bird or animal. ... And indeed didn't it turn out to be a perfect shot? A shot right through the heart.'" Pet. App. C at 13.

The prosecutor was also able to ridicule Draughon's claim that he was shooting wildly from the back of the pick-up truck as it was exiting from the scene by pointing out that: "'There is absolutely no physical evidence to support his version of the facts.'" Pet. App. C at 15. Although, as the Fifth Circuit noted, the testimony of a witness who said that Draughon shot at close distance was questionable, "[i]t was here that the absence of a counter-theory of greater distance supported by forensic evidence took its toll as it left her testimony largely unchallenged, relinquishing openings for questioning the accuracy of her testimony." Pet. App. C at 13.

The prosecutor herself, now a Texas state criminal court judge, expressed the view in federal habeas that evidence at trial of a ricochet of the fatal bullet "would have been very important evidence," and if such evidence were true, failure to present the evidence could have constituted ineffective assistance of counsel. Pet. App. C at 17. Both courts below, in analyzing this evidence, determined that there is "a reasonable probability that, absent the errors," the jury would have reached a different conclusion. *Strickland*, 466 U.S. at 695. Thus, there was "[a] reasonable probability ... sufficient to undermine confidence in the outcome." *Id.* at 694.

Finding that the proceeding was governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the court below found that the adjudication of Draughon's claim in state court resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States in *Strickland*. Both courts noted that despite Draughon's submission of affidavits from the chief and deputy medical examiners of Bexar County, Texas to the state court expressing the view that forensic examination was necessary because the limited evidence that was available raised the possibility of a ricochet, the state habeas court had refused to allow Draughon any discovery, including access to the fatal bullet, and thus prevented Draughon from developing the ballistics evidence that could have supported his defense theory. Pet. App. A at 28; Pet. App. C at 11. The state habeas court, nevertheless, "concluded that ineffectiveness of counsel could not be shown on the basis of possibly differing expert opinions, without knowing what Draughon's expert evidence would show." Pet. App. A at 28-29 The state court failed in its task, in applying *Strickland*, "to see what [expert] evidence might have been adduced and to gauge any prejudice resulting from trial counsel's failure to present it."

Pondexter v. Dretke, 346 F. 3d 142, 150 n. 11 (5th Cir. 2003), *cert. denied*, 541 U.S. 1045, 124 S. Ct. 2160 (2004) (internal quotation marks omitted). Thus, the courts below did not simply, as the State contends in its Petition, find that the state courts erred in the application of *Strickland*; they found that there was an unreasonable application of *Strickland*.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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